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VOL. II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 393

FEDERAL TRADE COMMISSION, PETITIONER

vs.

ROYAL MILLING COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1932
CERTIORARI GRANTED OCTOBER 24, 1932

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(Seal)

UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION

In the matter of D. V. Johnson, doing business under the name of "Tennessee Grain Co. and Tennessee Milling Co."	Docket No. 1598.

COMPLAINT.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that D. V. Johnson, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondent, D. V. Johnson, is an individual doing business under the name of "Tennessee Grain Co. and Tennessee Milling Co." Respondent for four years last past has conducted in the City of Nashville, Tennessee, a business of buying and selling grain, buying wheat flour from millers and mixing it with other ingredients to produce the commodity known to the public as self-rising flour; and to a small extent, representing a small percentage of his entire business, grinding grain for feed for stock and for whole wheat flour. In the conduct of his business aforesaid, respondent purchases wheat flour from millers throughout the Middle West, which he causes to be transported to his place of business in the City of Nashville, where it is blended and mixed with certain chemical leavening agents, such as baking powder. Respondent has solicited orders for blends and mixtures so produced from dealers in States other than the State of Tennessee, and contracts to sell and deliver and does sell and cause to be transported to purchasers outside the State of Tennessee flour so mixed by him. The respondent has been and is in competition with individuals, partnerships and corporations likewise engaged in the business of selling self-rising flour in interstate com-

merce, who either grind the flour they mix with other ingredients, or purchase the flour they use in mixing, as above described, and do not represent that they grind flour.

Paragraph Two: Respondent, in the carrying on of his business as aforesaid, solicits and sells his products principally through the mail service. The letterheads and invoices used by respondent in his business bear the statement, "Manufacturers of Soft Wheat Flour."

Paragraph Three: In the course of his business respondent delivers various brands of self-rising flour produced by him to purchasers in sacks on which are displayed the names and designs or brands adopted by him for the different blends, and the words "Tennessee Grain Company" and "Tennessee Milling Company," and the words "Patent Flour," or "Self-rising Flour," or both.

Paragraph Four: Respondent owns or operates no mill of machinery other than devices for mixing flour purchased by him with other ingredients for self-rising flour as above described, and machinery for grinding a small amount for feed and whole wheat flour.

Paragraph Five: The use by respondent of the names "Tennessee Grain Company" and "Tennessee Milling Company" in his business, and the representations in his business correspondence and otherwise, as aforesaid, have the capacity and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing his products they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman or any element of cost of a middleman's profits, and to induce purchasers of his flour by dealers and prospective purchasers on that understanding and belief; and said practices constitute unfair methods of competition with millers and manufacturers of flour likewise engaged in interstate commerce who grind the flour they offer for sale, or mixed as self-rising flour, and with producers and sellers of self-rising flour, likewise engaged in interstate commerce, who do not grind and manufacture but buy and sell flour made by others in their product and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and producers of self-rising flour, in that said practices of respondent tend to take away their business by false representations.

Wherefore, said acts and practices of respondent are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent

and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approve September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 19th day of April, A. D. 1929, now here issues this its complaint against respondent.

NOTICE.

Notice is hereby given you, D. V. Johnson, respondent herein, that the 3rd day of June, A. D., 1929, at 10:30 o'clock in the forenoon, is hereby fixed as the time, and the office of the Federal Trade Commission, in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required within thirty (30) days from service of the complaint, unless such time be extended by order of the Commission, to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answers and failure to answer (Rule III) provide as follows:

> (1) In case respondent shall desire to contest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.
>
> (2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter and serve upon respon-

dent an order to cease and desist from the violation of the law alleged in the complaint or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 19th day of April, A. D., 1929.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

THE ANSWER OF D. V. JOHNSON TO THE COMPLAINT IN THIS CAUSE FILED AGAINST HIM —Filed May 20, 1929.

Respondent for answer says:

Answering Paragraph One:

1. It is true that respondent D. V. Johnson is doing business in Nashville, Tennessee, under the name of "Tennessee Grain Company and Tennessee Milling Company," but the duration and nature of said business is not correctly described in the complaint, the fact being that the Tennessee Grain Company was incorporated about 1906, and that its charter was surrendered about 1912, the said D. V. Johnson assuming all liabili-

ties and taking over all assets; that said corporation was organized by the said D. V. Johnson for the handling of grain; that thereafter, about the year 1920, machinery was installed for the grinding of feed and whole wheat flour; that still later other machinery was installed for the manufacture of self-rising and processed flour; that the words "and Tennessee Milling Company" were added to respondent's trade name because the original corporate and trade name had become confused with similar trade names of other individuals thereafter going into business in this vicinity, and because it was properly descriptive of the business carried on by respondent.

2. Respondent admits that he is engaged, as part of his business, in the grinding of grain for feed for stock and for whole wheat flour, but denies that his is a small percentage of his business.

3. Respondent denies that the process of making self-rising flour is correctly described in the complaint, and avers that said process is both a milling and a manufacturing process, whereby, through the use of machinery, flour and other ingredients are turned into a distinct product.

4. Respondent admits that he has solicited orders for the product so manufactured from dealers in States other than Tennessee, and that he sells and causes to be transported the product so manufactured to purchasers outside the State of Tennessee.

5. It is admitted that others compete with respondent in the sale of self-rising flour, but respondent is without knowledge as to whether these competitors are individuals, partnerships, or corporations, or as to what extent, if any, they are engaged in interstate commerce.

6. Respondent denies that those of said competitors who are so-called "millers" grind all the self-rising flour which they sell in competition with respondent, and on the contrary avers that they, to a greater or less extent, buy flour which they make into self-rising flour by the same process used by respondent, and put out this product in their own bags and under their own brands, and respondent insists that "unfair competition" cannot be claimed for their protection, as hereinafter shown. Respondent is without knowledge of any so-called "blenders" of self-rising flour in competition with respondent who "do not represent that they grind flour," as alleged in the complaint.

Answer of D. V. Johnson to the Complaint, etc.

Answering Paragraph Two:

1. Respondent denies that in carrying on his said business he sells and solicits his products principally through the mail service.

2. Respondent admits that the letter heads and invoices used by respondent, or which have been used by respondent, in his business, bear the statement "Manufacturers of Soft Wheat Flour," the explanation being that respondent is both a miller and manufacturer of soft wheat flour in producing self-rising flour and processed flour, and that these words were used without any intent to deceive, and without any deception of his customers or prospective customers.

Answering Paragraph Three:

It is admitted that in the course of his business respondent delivers various brands of self-rising flour, produced by him, to purchasers in sacks on which are displayed the names and designs, or brands adopted by him, for his manufactured product, and also the words "Tennessee Grain Company" and "Tennessee Milling Company," and the words "Patent Flour," or "Self-rising Flour," or both, the explanation being that the names above shown together constitute his trade name, and the words "Patent Flour" having a technical meaning, well understood in the trade, and having no tendency to make respondent's customers, or any one conversant with the flour business, believe that respondent was himself grinding such flour.

Answering Paragraph Four:

Respondent denies that his plant and machinery is correctly described in this paragraph of the complaint, in so far as it is alleged that respondent owns devices for mixing self-rising flour, the fact being, as hereinbefore set out, that self-rising flour is a manufactured product, produced by the operation of milling machinery. Respondent admits that he owns machinery for grinding feed and whole wheat flour, but denies that this is a small amount. Respondent avers that the value of his plant is approximately $50,000.00, and that the amount of his investment to carry on business is approximately $250,000.00.

Answering Paragraph Five:

1. Respondent denies the statement that the use by respondent of the names "Tennessee Grain Company" and "Tennessee Milling Company," in his business, and the conclusion that the representations in his business correspondence and otherwise (no facts being stated) have the capacity, and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing his products they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman, or any element of cost of a middleman's profits, and to induce purchases of his flour by dealers and prospective purchasers on that understanding and belief, as alleged in the complaint.

2. Respondent avers that the wheat "miller" does not, and cannot, make self-rising flour by the use of his grinding machinery, but is compelled to first get his raw flour, either by grinding or purchase, and then by a separate milling process, and by separate machinery (practically the same as that used by this respondent) turn it into self-rising flour. The "miller" who grinds his own flour has no advantage thereby, for he must absorb the local crop of wheat, which may or may not be good, whereas the so-called "blender" can buy the best flour wherever it is produced, and can buy such flour at actual cost. The explanation of this is that by selling their surplus at actual cost the wheat-grinding millers from whom he purchases are enabled to keep their mills going night and day, thus greatly reducing cost.

3. Respondent avers that there is no "middleman's profit" involved unless the self-rising flour which has been manufactured, as aforesaid, in the same way by both "miller" and "blender," is sold through a jobber; and where this is not done, and where the sale is made direct to the retailer, middle man's profits on self-rising flour are in fact eliminated.

4. Respondent further avers that the so-called "miller" has no advantage as to cost of manufacture, for it costs him as much, or practically as much, to manufacture his raw flour as it does for respondent to buy his raw flour, which he obtains very cheaply for the reason hereinbefore stated. The production of self-rising flour is, as aforesaid, a separate milling process, as to which the so-called "miller" has no advantage, but is rather at a disadvantage.

5. Respondent further denies that said practices con-

stitute unfair methods of competition with millers and manufacturers of flour, alleged to be engaged in interstate commerce, who grind the flour they offer for sale alone, or mixed, as self-rising flour, and with producers of self-rising flour alleged to be engaged in interstate commerce who do not represent themselves to be millers or manufacturers of flour, as alleged in the complaint.

Respondent further denies that he is in competition with any sellers of raw or plain flour, and denies that he claims to be a manufacturer of plain flour, and denies that his customers believe him to be engaged in the manufacture and sale of plain flour.

6. Respondent denies that he has made any false representations to the injury of said "millers" and producers of self-rising flour, and that he has taken away their business by false representations, as alleged in the complaint.

7. Respondent denies that said acts and practices, alleged to have been committed by respondent, are all to the prejudice of the public, and constitute unfair methods of competition within the meaning of the Federal Trade Commission Act, and avers on the contrary that this proceeding, which is in fact (although not intentionally) in the interest of a few private individuals, is to the injury of the public, and not within the spirit or letter of the Act.

Answering The Whole Complaint, respondent, in addition to the defenses hereinbefore set out, for further defense says:

1. Respondent denies that the complainant, the Federal Trade Commission has jurisdiction of this proceeding.

2. Respondent denies that this proceeding falls within or is covered by the said Act of Congress creating the Federal Trade Commission.

3. Respondent denies that this is a proceeding in the interest of the public, and insists that the practices described in the complaint do not substantially tend to affect the public to its injury.

4. Respondent insists that this proceeding, so far from being in the interest of the consuming public, is in fact (although not intentionally) in the interest of a few private individuals, competitors of respondent; that the effect of sustaining this proceeding will be to injure the respondent and make his competition less effective, in that he will be charged by said competitors with fraudulent and willfully unfair practices; and that the effect of so reducing the competitive power of respondent will

be to ultimately raise the price to the consuming public to its injury.

5. Respondent further states that the use, by him, of the words "milling" and "manufacturer" has been and is in good faith, and under claim of lawful right, and is justified by the strictest interpretation of the terms, in that respondent, as part of his business, is engaged in grinding feed and whole wheat flour; that no fraud or deceit of any kind has been practiced on the public (none being charged in the complaint); that there has been no substitution by respondent of an inferior for a superior article, to the injury and deception of the consuming public; that the wheat "miller" does not manufacture self-rising flour by the use of his grinding mill, but by the same process as that used by respondent manufacturers the same self-rising flour, which is in no wise superior to the product of respondent, but which is more apt to be inferior.

6. Respondent is without knowledge of any producers of self-rising flour (so-called "blenders") who claim to have been injured in competing with respondent by the use of the words "Milling" or "Manufacturer," and denies that any persons claiming to be injured are his competitors, but alleges on the contrary that the competitors who are objecting to the use of said words by respondent are individuals, firms, or corporations, owning wheat-grinding mills, but also engaged in the manufacture and sale of self-rising flour in competition with respondent.

With respect to such competitors, respondent insists that they are guilty of the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondent is advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors who are themselves engaged in the same practices condemned by the complaint.

7. Respondent avers that his sales are made to customers who are familiar with his methods, and that none of his customers are in fact deceived or misled into thinking that he operates a wheat-grinding mill, and respondent avers that it would not be to his advantage if they did think so, because better self-rising flour can be made by the so-called "blender." The "miller" is to a large extent dependent on the local crop, but respondent can buy wherever the crop is best.

8. Respondent denies that he has represented or led his customers or the public to believe that middleman's profits are excluded, etc., as alleged in the complaint. This charge is a mere unwarranted inference or conclusion without facts alleged to support it.

9. Respondent avers that in 1916 certain interested persons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, in October, 1916, handed down an opinion, which remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondent submits that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors.

10. Respondent for further defense submits that the complainant Federal Trade Commission, after ex parte investigation, has prejudged this case on questions of fact which are of vital, if not controlling, importance, in that its authorized agent, acting in its behalf, has in writing stated that said Commission was of the opinion that respondent is not engaged in a manufacturing or milling process.

Respondent does not charge any bad faith or intentional unfairness on the part of the Commission, but submits that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that this respondent is thereby denied due process of law in this proceeding.

And respondent further submits that if the Federal Trade Commission Act is to be construed as authorizing such procedure such portion of said Act contravenes the Fifth Amendment to the Constitution of the United States, in that the Federal Trade Commission is not only undertaking to act at the same time as litigant and judge —which is contrary to the fundamental maxim that no man shall be a judge in his own case—but its findings of fact, although erroneous and contrary to the weight of

the evidence, are conclusive if supported by any material evidence, and for this reason a full review of its action by an impartial tribunal is denied, and litigants are thereby deprived of their property without due process of law.

11. Respondent further avers that he has no wish, and has never had any wish or intention, to use unfair methods in competition, and has never used the words "Milling" or "Manufacturer," or any other words mentioned in the complaint, with any intent to deceive or make false representations of any kind, being advised on the contrary that said words are truthful and fully authorized under the facts hereinbefore set out; and respondent submits that he should not be required to give up the trade name under which a valuable good will has been acquired; that this would inflict an unnecessary loss and hardship on respondent, and would in no wise benefit the public.

12. Respondent further states that he and other Nashville manufacturers of self-rising flour and processed flour supply a trade which is accustomed to buy in small quantities, and such service is an economic necessity in said territory and in the interest of dealers and of the consuming public, and enables consumers to obtain these products at a lower price than would be possible if such service were withdrawn or discontinued.

Respondent further avers that all self-rising and processed flour is of the same general type, whether manufactured by the so-called "millers" or the so-called "blenders," and that competition between them can only be determined, and is in fact determined, by three factors, to-wit, price, quality, and service. The grinding of flour in a particular mill is not, and cannot be, a factor.

Wherefore, respondent having fully answered, prays that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondent,
Suite 1012 Nashville Trust
Building,
Nashville, Tennesse.

AMENDED COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that D. V. Johnson, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondent, D. V. Johnson, is an individual doing business under the name of "Tennessee Grain Co. and Tennessee Milling Co." Respondent conducts in the City of Nashville, State of Tennessee, a business of buying and selling grain, and to a small extent, representing a small percentage of its entire business, grinding grain for feed for stock and for whole wheat flour; and buying various lots and grades of wheat flour from mills located in the Middle West which respondent causes to be transported to his place of business in the City of Nashville and there blending and mixing the flour so purchased by him and putting up in sacks and offering for sale the mixtures or blends resulting therefrom, in some instances adding leavening agents such as baking powder to the blends or mixtures producing the commodity known as "self-rising flour." Respondent solicits orders for the blends and mixtures so produced from dealers in States other than the State of Tennessee and contracts to sell and deliver and does sell and cause to be transported to purchasers outside the State of Tennessee flour so mixed by him. Respondent has been and is in competition with individuals, partnerships and corporations likewise engaged in the business of selling wheat flour, either in plain or self-rising form, in interstate commerce who either manufacture the flour they sell by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour; or purchase the flour they offer for sale, whether as plain or self-rising, and do not in their trade names or otherwise in the conduct of their business use the terms "mill," "mills," "miller," or "milling" or otherwise represent that they ase engaged in the manufacture of flour as above described. Respondent in carrying on his business as aforesaid solicits orders and sells his products largely to retail grocers through the mail service.

Amended Complaint

Paragraph Two: Respondent in carrying on his business as aforesaid uses letterheads and invoices on which appears the statement, "Manufacturers of Soft Wheat Flour."

Paragraph Three: In the course of his business respondent delivers various brands of flour to purchasers in sacks on which are displayed the names and designs or brands adopted by him for the different blends or mixtures, and the words "Tennessee Grain Co. and Tennessee Milling Co.," and the words "Patent Flour," "Plain Patent Flour," or "Self-rising Flour."

Paragraph Four: Respondent owns or operates no mill or machinery other than devices for blending or mixing the lots and grades of flour purchased by him from millers as above described, and machinery for grinding a small amount of feed and whole wheat flour. He does not manufacture, by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour, the flour offered for sale and sold by him and owns or operates no mill or machinery fitted for that purpose.

Paragraph Five: The use by the respondent of the name "Tennessee Grain Co. and Tennessee Milling Co." in his business and the representation in his business correspondence and otherwise as aforesaid have the capacity and tend to lead dealers and prospective purchasers of plain or self-rising flour to believe that in purchasing his products they are buying flour direct from a miller or manufacturer of flour as above described and without the intervention of a middleman or any element of cost of a middleman's profit, and induce purchases of his flour by dealers and consumers on that understanding and belief; and said representations constitute unfair methods of competition with millers or manufacturers of flour likewise engaged in interstate commerce who make, as above described, the flour they offer for sale and with sellers of flour likewise engaged in interstate commerce who do not so manufacture the flour but buy and sell flour made by others and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and sellers of flour in that said representations of respondent are false and misleading and tend to take away their business.

Wherefore, said acts and practices of respondent are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled

Amended Complaint

"An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission, on the 3rd day of September, A. D., 1929 now here issues this its amended complaint against respondent.

NOTICE.

Notice is hereby given you, D. V. Johnson, doing business under the name of "Tennessee Grain Co. and Tennessee Milling Co.", respondent herein, that the 4th day of October, A. D. 1929, at 2 o'clock in the afternoon is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required on or before said date, to file with the Commission as answer to the complaint. If answer is filed appearance on that date will not be required and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

(1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the complaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegations of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding

or that respondent consents that the Commission may make, enter, and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to appear to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, The Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C. this 3rd day of Sptember, A. D., 1929.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

ANSWER TO AMENDED COMPLAINT—Filed Oct. 3, 1929.

The Answer of D. V. Johnson to the Amended Complaint in this cause filed against him.

Respondent for answer says:

1. It is admitted that the respondent D. V. Johnson is an individual, doing business in Nashville, Tennessee under the name of "Tennessee Grain Company and Tennessee Milling Company." It is denied that he is engaged merely in blending and mixing flour, and adding leavening ingredients thereto, so as to make self-rising flour; but on the contrary, this portion of respondent's business consists in the production of "processed" and

"self-rising" flour by a milling and manufacturing process.

2. It is admitted that respondent contracts to sell, and sells and delivers his products outside the State of Tennessee.

3. Respondent admits that he is in competition with others in making and distributing said products, but is without knowledge as to whether they are individuals partnerships, or corporations, or as to whether they are engaged in Interstate Commerce, or as to whether they manufacture the flour sold by grinding or crushing wheat, or as to whether they purchase the flour which they offer for sale, and do not, in their trade names, or otherwise, use the term "Mill," "Miller," or "Milling," or otherwise represent that they are engaged in the manufacture of flour, etc., as alleged in the complaint.

4. Respondent denies that he solicits orders and sells his products largely to retail grocers through the mail service.

5. Respondent denies that those of his competitors who are so-called "Millers" grind all the self-rising flour which they sell in competition with respondent, and on the contrary avers that they, to a greater or less extent, buy flour from others, which they make into self-rising flour by the same method used by respondent, and put out this product in their own bags and under their own brands; and respondent avers that the same is true with respect to "processed" flour.

6. Respondent admits that in the conduct of his business, as aforesaid, he solicits orders, and sells his products under the name of "Tennessee Grain Company and Tennessee Milling Company." The Tennessee Grain Company was incorporated by respondent about the year 1906, and its charter was surrendered about 1912, respondent assuming all liabilities and taking over all assets. Said corporation was organized by respondent for the handling of grain. Thereafter, about the year 1920, machinery was installed for the grinding of feed and whole wheat flour. Still later, other machinery was installed for the manufacture of self-rising and processed flour. The words "And Tennessee Milling Company" were added to respondent's trade name because the original corporate and trade name had become confused with similar trade names of other individuals thereafter entering business in this vicinity, and because it was properly descriptive of the business carried on by respondent.

7. Respondent denies that the letter-heads, bags, and

advertising matter, and the statements therein appearing, are correctly described in the complaint.

8. Respondents admits that the words "Milling" and "Manufacturer" are used by him in connection with letter-heads, advertising matter, and bags, in the conduct of his business.

9. Respondent has hereinbefore explained why he assumed and uses the name "Tennessee Grain Company and Tennessee Milling Company."

10. Respondent denies that he owns or operates no mill or machinery other than certain mixing devices, etc., and avers that he owns machinery adapted to the manufacture of self-rising and processed flour, which is both a milling and manufacturing operation, the value of respondent's plant being approximately $————, and of his machinery and equipment approximately $————, and of his investment, capital, etc., approximately $————; or a total investment of approximately $————. Respondent's plant has a capacity of about ———— barrels a day on a twenty-four-hour basis. In 1928 respondent did a business of approximately $————.

It is true that respondent owns no wheat-grinding machinery for the production of flour used in manufacturing self-rising or processed flour.

11. Respondent denies that the use of the aforesaid trade name, with the word "Milling" separately, or in combination with the term "Manufacturer," or any other statements on respondent's letter-heads, bags, etc., has any tendency to make dealers or prospective customers or consumers believe that they are buying flour from a miller and manufacturer without a middle man's profits, etc., as claimed in the complaint.

12. Respondent denies that any false representations are thereby made, and denies that these alleged practices, if proven, constitute any unfair competition with millers and makers of self-rising flour or processed flour, alleged to be likewise engaged in Interstate Commerce, etc.

13. Respondent denies that said alleged actions have the effect of taking away business improperly from said alleged competitors, and on the contrary avers that said conduct, if proven, could have no such possible effect:

(a) Because the so-called "millers" do not and cannot make self-rising flour with their grinding mills, but must first obtain raw flour, either by grinding it, or by purchasing the same, and then turn it into self rising flour.

(b) Because said "Millers" obtain no advantage from making self-rising flour from the flour which they grind, but are rather at a disadvantage, both as to cost of the raw flour, and as to its quality, as will be shown at the hearing.

(c) Because self-rising and processed flour, no matter by whom made or sold, is essentially the same product destined for consumption in a particular region, and the buyers of such flour are governed by only three factors, to-wit; price, quality, and service.

(d) Because there is no pretense in the complaint that self-rising or processed flour made by the so-called "miller" is any better than that manufactured by the so-called "blender," and there is no deception of the public by substituting an inferior for a superior article.

14. Respondent avers that those of its competitors who are "Millers" follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondent is advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors who are themselves engaged, as against respondent, in the same practices condemned by the complaint.

15. Respondent denies, as hereinbefore set out, that the use of the word "Mills," "Milling," or "Manufacturer," misleads, or has the tendency to mislead, any substantial portion of the purchasing or consuming public, in that they may be led to believe they are buying from one who grinds his wheat. But respondent is willing to cut off the possibility of deceiving, or misleading, any purchaser or customer through the use of the words above quoted, and to this end has heretofore offered, and hereby offers, to place on his letter-heads, bags, invoices, etc., in conspicuous lettering the words:

"Not grinders of Wheat."

Respondent believes and states that he is a "miller" and a "manufacturer" in that he turns out a distinct product by the use of milling machinery—but he is not, and does not claim to be, a grinder of wheat, and is willing that this be distinctly and unequivocally stated.

16. Respondent, under the trade name aforesaid, has acquired a valuable good will, and he insists that it would be unjust and inequitable to deprive him of this.

Respondent avers that in 1916 certain interested per-

sons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, in October 1916 handed down an opinion, which remains of records, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondent submits that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors, thereby depriving respondent of the valuable good will which he has built up.

17. Respondent denies that this proceeding is in the interest of the public, as claimed in the complaint, and alleges on the contrary that said proceeding is actually (though not intentionally) in the interest of a few private individuals, competitors of the so-called "blenders," and that its tendency and effect, if sustained, will be to injure and exploit the consuming public for the benefit of private individuals. Respondent insists that the practices described in the complaint do not substantially tend to affect the public to its injury; denies that this proceeding falls within or is covered by the Act of Congress creating the Federal Trade Commission; and denies that the Complainant, Federal Trade Commission, has jurisdiction of this proceeding.

18. Respondent submits that Section 5 of the Federal Trade Commission Act, and the procedure thereunder, violate the Fifth Amendment to the Constitution of the United States, in that said Federal Trade Commission is not and cannot be impartial, since it acts both as plaintiff and judge in the same proceeding, and because its findings, however erroneous, and however opposed to the weight of evidence, are binding and conclusive on review if supported by any material evidence, and thus a full review by an impartial tribunal is denied, and the litigants before said Commission are thereby deprived of due process of law.

Respondent further submits that the Complainant, Federal Trade Commission, after ex parte investigation,

has prejudged this case on questions of fact, which are of vital, if not controlling importance.

Respondent does not charge any bad faith, or intentional unfairness, on the part of the Commission, but submits that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that this respondent is thereby denied due process of law in this proceeding.

And now having fully answered, respondent prays that said complaint be dismissed.

Thomas H. Malone
Counsel for Respondent,
Suite 1012 Nashville Trust Bldg.,
Nashville, Tennessee.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 19th day of October, A. D., 1929.

Commissioners:
Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matters of	
Royal Milling Co., et al.,	Docket No. 1597
Tennessee Grain Co.,	Docket No. 1598
Nashville Roller Mills,	Docket No. 1599
Snell Milling Co.,	Docket No. 1600
Watauga Milling Co., et al.,	Docket No. 1601
State Milling Co., et al.,	Docket No. 1602
Cherokee Mills Co., et al.	Docket No. 1604

ORDER.

The above-entitled matters coming on for consideration by the Commission on the suggested solutions of the issues raised in the complaints filed July 12, 1929, by Thomas H. Malone, counsel for respondents, and the Commission now being fully advised in the premises.

It Is Ordered that said suggested solutions be considered at the time of final argument on the merits.

By the Commission.

(Seal) Otis B. Johnson,
Secretary.

STIPULATION OF COUNSEL.

In the above styled cause it is stipulated and agreed between Baldwin B. Bane, Esq., counsel for Federal Trade Commission, and Thomas H Malone, counsel for respondents, and subject to the approval of the Federal Trade Commission:

I. That all evidence taken in the case of Francis J. McCarthy, doing business under the names of Watauga Milling Company, etc., (Docket No. 1601), may be considered as part of the evidence herein.

II. That the matters hereinafter covered by further stipulation in this cause may be considered in said cause of Francis J. McCarthy, doing business, etc. (Docket No. 1601), so far as they may be material to the general issues raised by the pleadings.

III. That in addition to the evidence in said cause (Docket No. 1601) the following additional facts are stipulated with reference to this cause:

1. That in 1905 the respondent D. V. Johnson procured a charter from the State of Tennessee under the corporate name "Tennessee Grain Company," and began business as a grain dealer; that this charter was surrendered in 1912, the said D. V. Johnson assuming all liabilities and taking over all assets; that said corporation was organized by the said D. V. Johnson for the handling of grain, and that the said respondent continued business as a grain dealer until about the year 1920.

2. That about the year 1920 machinery was installed by respondent for the grinding of feed and whole wheat flour.

3. That thereafter—about four years ago—other machinery was installed for the making of "self-rising" and "processed" flour—the said respondent being at the present time engaged exclusively in making "self-rising" and "processed" flour along the same general lines and by machinery of the same type as that employed, used and described in the testimony of respondent Francis J. McCarthy in Docket No. 1601.

4. That respondent is not now engaged in the grinding of whole-wheat flour or feed, but his plant is equipped for the manufacture of these commodities, but in a limited way as compared to his output of "self-rising" and "processed" flour.

5. That the words "and Tennessee Milling Company" were added to respondent's trade name because the original corporate and trade name had become con-

fused with similar trade names of other individuals thereafter entering business in this vicinity. That this addition was made at a time when respondent was operating grinding machinery for the manufacture of whole-wheat flour and feed, and before respondent installed the machinery for making "self-rising" and "processed" flour.

6. That when respondent first went into the business of selling "self-rising" and "processed" flour and until about two years ago he continued to use largely bags and stationery bearing only the name "Tennessee Grain Company." His brands were introduced and his connections in the "self-rising" and "processed" flour business were largely made while he was using, for the most part, such bags and stationery.

7. That since that time respondent has been using the name "Tennessee Grain Company and Tennessee Milling Company" in conducting his flour business, and the same appears on all stationery and bags.

8. That the brands put out by said respondent are as follows:

"Tennessee"—"Superlative Patent Plain."
"Commodore"—"Superlative Patent Plain."
"Diamond T"—"Superlative Patent Self-rising."
"Golden South"—"Superlative Patent Self-rising."
"White Gold"—"Fancy Patent Plain."
"Five Points"—"Fancy Patent Plain."
"Fancy Biscuit"—"Fancy Patent Self-rising."
"All the Talk"—"Fancy Patent Self-rising."
"Magnolia"—"Special Patent Plain."
"Goodeola"—"Special Patent Self-rising."

9. That said respondent in carrying on his business, buys and sells in Interstate Commerce.

10. That of the flour which goes through the processes already described, in respondents plant, and is afterwards sold to the trade, approximately 75% is "self-rising" and 25% "processed."

11. That said respondent, in 1929, did a business which in barrels amounted to 105,000, and in dollars and cents approximately $750,000.00.

12. That the value of respondent's plant is approximately $50,000.00 and his investment approximately $200,000.00.

13. That exhibits 1 to 4 inclusive show letter-heads, invoices, or trade circulars of the respondent.

Stipulation of Counsel

14. That exhibits 5 to 12 inclusive show the various bags, sacks, brands, etc., used by said respondent in carrying on his business.

15. That respondent sells his products through brokers and by mail to the retail trade, and does not solicit wholesalers.

16. That under date of February 20, 1929, a letter was addressed to Tennessee Grain Company and Tennessee Milling Company, signed by Web Woodfill, Chief Trial Examiner of Federal Trade Commission, enclosing a proposed stipulation. Said letter is marked exhibit 13 hereto, and said proposed stipulation exhibit 14. These exhibits are subject to the same objections, ruling of the Examiner, and exceptions made with reference to the offer of similar exhibits in Docket 1601, R., p. 1066, et seq., respondents' exhibits for identification 71 and 72.

17. That under date of July 12, 1929, a proposed solution of the controversy between respondent and the Federal Trade Commission was offered—the nature of said proposed solution, and the action of the Commission with respect thereto, being set out in the testimony of the witness Vernon S. Tupper, at pages 1070, et seq., of the record in Docket No. 1601.

IV. That the Federal Trade Commission wrote this respondent and also the respondents in Docket 1597 (Royal Milling Company), Docket 1599 (Nashville Roller Mills), Docket 1600 (Snell Milling Co.), Docket 1601 (Watauga Milling Co.), Docket 1602 (State Milling Co.), Docket 1604 (Cherokee Mills), Docket 1607 (Old Hickory Mills), Docket 1617 (Southern Milling Co.), and also Mero Mills, (which, it is stipulated, is the same Mero Mills mentioned in the testimony of the witness Thomas E. Snell in Docket 1601 at pages 934, et seq., of the record), a letter similar in form to respondents' exhibit 68, as shown in the testimony of the witness Vernon S. Tupper in Docket No. 1601, at page 1039, of the record, requesting from each a list of twenty-five customers; that nine of the above named concerns complied with said request; and that from the names so furnished the Federal Trade Commission obtained the twenty-five merchants or dealers, who were examined in chief on behalf of the Commission in said cause, Docket No. 1601, with the exception of the following two witnesses—Walter Cunningham and C. S. Ragland.

V. That to prevent the expense, delay and trouble incident to a separate trial of this cause, the same may

be heard and determined by the Commission in connection with said cause of Francis J. McCarthy, doing business, etc., Docket No. 1601,—it being agreed that the evidence introduced in said cause (Docket No. 1601) may be looked to by either party as if taken in this cause, and with respect to this respondent, except in so far as changed by this stipulation, and that the record therein shall constitute part of this record.

Thomas H. Malone,
For Respondents.
Baldwin B. Bane.

United States of America
BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D. 1931.

Commissioners:

C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the matter of D. V. Johnson, doing business under the name of Tennessee Grain Company and Tennessee Milling Company.	Docket 1598.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served an amended complaint upon the respondent above named charging him with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

The respondent having entered his appearance and having filed his answer herein, a stipulation as to the facts was entered into between counsel for the respondent and counsel for the Commission in which it was stipulated and agreed that the Federal Trade Commission should take such stipulation as to the facts in lieu of testimony.

Thereupon this proceeding came on for final hearing on the briefs submitted by counsel for the Commission and counsel for the respondent and argument by counsel for the Commission and counsel for the respondent, and the Commission having duly considered the record and being fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

Paragraph One: Respondent, D. V. Johnson, an individual, conducts business under the trade name Tennessee Grain Company and Tennessee Milling Company. Respondent began business in 1905 as a grain dealer un-

der the name Tennessee Grain Company. He continued in business as a grain dealer under this name until about 1920. About the year 1920 machinery was installed by respondent for the grinding of feed and whole wheat flour. Respondent is not now engaged in the grinding of feed or whole wheat flour but his plant is equipped for such although in a limited way as compared with the flour which he mixes and sells as described below. Respondent is now and has been since about 1925 or 1926 engaged in the business of buying flour from concerns that grind wheat into flour and then mixing such flours, in some instances adding phosphate, and in other instances adding salt, soda, and phosphate, which makes the flour ready for use without the addition of baking powder, and thus gives to it the name of self-rising flour. He then packs the flour in bags under brands of his trade name, and sells it to dealers located in various states of the United States, but particularly in the Southeastern States. Respondent buys the flour from concerns grinding wheat into flour and located at various points throughout the United States. This flour is shipped to him at Nashville, Tennessee, at which point his place of business is located, and from which point he ships the flour to his customers. In the course and conduct of his business respondent is in competition with other individuals, corporations and partnerships engaged in the sale of flour in interstate commerce.

Paragraph Two: Respondent puts the flour which he buys from concerns located at various points throughout the United States in what is called a batch mixer, where it is stirred up and mixed together. Usually but not always two or more flours are so mixed or stirred up together. If the flour is to be self-rising there is added in this mixer the correct proportions of salt, soda, and phosphate. If it is not to be self-rising a little phosphate is added in the mixer. The flour is then run from this batch mixer into bins, from which it goes to a draver feeder which feeds the flour into elevator cups, which carry it to the reel or sifter, from whence it goes after being sifted into hopper bins, and thence to the packer where it is packed into bags of the desired size. There is no grinding process in the operation. Respondent sells ten brands of flour under this trade name, but each brand does not represent a different grade or quality of flour. It takes from ten to fifteen minutes to run the flour through the equipment used by respondent. The cost of the machinery in such a plant as the respondent's, having a capacity of

3,000 barrels a day on a 24-hour run, is approximately $20,000 to $25,000, and the total investment approximately $150,000 to $200,000. The value of respondent's plant is approximately $50,000 and his total investment approximately $200,000.

Paragraph Three: The grinding of wheat into flour has developed by various steps until today it has become a refined, complex, and scientific process. Roughly, the operations which constitute the process are: (1) cleaning and otherwise preparing the grain for grinding; (2) the grinding or reduction of the grain; (3) the bolting or sifting operation; (4) purification and preparation of the product by blowing air through it, adding phosphate, bleaching agents, etc. The modern method of grinding wheat substitutes for the single grinding between millstones a succession of grindings between several sets of iron or porcelain rollers. The wheat when received at the mill is unloaded into elevators or bins, and is thoroughly screened and dry cleaned and scoured by machines especially adapted for that purpose. This process itself is quite complicated, requiring a great deal of machinery. The wheat is analyzed and graded and then tempered and conditioned, preparatory to being ground. It is then passed through the rollers, each passage through a pair of rollers being called a break, and different concerns using different numbers of breaks. After each break the product is sifted or bolted, and the results of the siftings go into various streams, which are carried to other sets of rollers where they are again crushed or broken, the process being a continuous operation. A five break mill has eighteen spans of rolls and thirty-two separations. Each break effects a mechanical separation. The bolting or sifting separates the results of the breaks into various streams and products, such as flour, middlings, offals, bran, shorts, etc. The bolting or sifting machine is commonly referred to as a reel. After the flour has gone through the rolls it is again bolted or sifted, and then sent to the packing room. The flour is milled to definite standards in order to insure uniformity. The wheats for the various brands of flour made by the mill are selected by the chemist and the superintendent from reports which are on file in the superintendent's and chemist's offices, showing the characteristics and chemical constituents of the wheats. Concerns grinding wheat into flour are known as "Manufacturers of Flour." Bolting or sifting has been done by the concerns grinding the wheat into flour in this country from the earliest times.

Findings as to the Facts and Conclusion

The number of boltings or siftings differs in different mills, and is of importance in determining the appearance of the flour. Bolting or sifting is but a part of the process of preparing the flour. Concerns grinding wheat into flour bleach the flour, the bleaching agent being added on the mill stream. This bleaching matures or ages the flour, thus improving its baking qualities, and whitens its. Concerns grinding wheat into flour blend flours by a blending of the wheats after a chemical analysis of such wheats, and by blending the various streams of flour produced by the different breakings of the wheat berry between the various rolls in the mill. Concerns grinding wheat into flour maintain a laboratory and an experimental mill in charge of a chemist, in which the wheats and flours are analyzed and tested in order to determine their various characteristics, such as gluten content, protein content, moisture content, ash content, etc., in order to keep each of the brands of flour put out by such concerns uniform. It is only from chemical tests that such contents of the flour can be determined and the uniformity of each brand maintained. These characteristics determine the grade and quality of the flour. Unless these characteristics of the flour are maintained practically uniform in each brand of flour, the flour can not be kept up to one standard. Concerns grinding wheat into flour are very jealous of their grades and brands, and guard and protect them with great care. All mills in the process of grinding the wheat and preparing the flour make or produce several grades of flour. These are, in the order of the best and highest priced grades: patent flour, which means that part of the stream of flour which is left after taking off a greater or less percent of the inferior flour —it is the best flour made by the mill; straight flour, which means one hundred per cent flour, all the flour that is extracted from the wheat berry; clear flour is the flour taken off by the mill after the patent flour has been removed; low grade flour designates all of the lowest grades made by the particular mill. These terms indicate with different mills' flours of widely different qualities. The cost of the machinery for a concern grinding wheat into flour with a capacity of about 3,000 barrels a day is about $600,000, and the total investment between $1,000,000 and $1,500,000. The time required for preparing the wheat and producing the flour by such a concern is from eight hours to fifty or sixty hours, due to difference in time required for tempering the wheat. But if the tempering time is excluded, the time required is from a half

hour to one and a half hours, depending upon the number of breaks and boltings used by the concern.

Paragraph Four: Practically all concerns grinding wheat into flour add phosphate to the flour on the mill stream, that is, as the flour is run through the mill. This addition is for the purpose of whitening the baked product and counteracting an overdose of soda. Self-rising flour is flour to which there has been added in correct proportions salt, soda, and phosphate, so that the flour is ready for use without the addition of baking powder by the cook. It is particularly adapted to the making of biscuits. A formula for mixing self-rising flour was discovered by Professor Liebig about seventy-five years ago. The self-rising flour business was originated or begun in Nashville, Tennessee, by a Dr. Owsley. He operated under the name Owsley Flour Company and sold through the Southeastern States. This company was succeeded by the Ford Flour Company about 1897, which concern is still in existence and selling self-rising and plain or phosphated flour throughout the South. The concerns originating the mixing of self-rising flour in Nashville and not grinding wheat into flour did not call themselves mills or milling companies, or manufacturers of flour. Most of those actually grinding wheat into flour and selling in the Southeastern States mix and sell self-rising flour, and such is usually produced directly from the mill stream—that is, by running the mill stream directly into mixers where the self-rising ingredients are added before the flour is finally bolted and packed. Respondents sell in competition with those actually grinding wheat into flour, and in competition with those engaged in the same character of business as respondents and who do not represent themselves as mills or milling companies, or manufacturers of flour.

Paragraph Five: Nashville, Tennessee, is the center of the flour industry in the South. There are several concerns located there grinding wheat into flour, and other concerns used to be located there that ground wheat into flour. There are approximately 170 concerns actually grinding wheat into flour and selling in the Southeastern territory.

Paragraph Six: Respondents do not have or maintain a laboratory for testing or analyzing the flours which they buy or sell.

He uses regularly only the so-called paddle test, which consists in simply putting the flour on a paddle and looking at it. By this test the characteristics or qualities of the flours, such as gluten content, protein content, mois-

true content, starch content, etc., cannot be determined. Only the relative appearance of the two flours can be gotten from such a test, and this is of little value in approximating even the grade of the flour, because practically all concerns grinding wheat into flour add phosphate and a bleaching agent to the flour on the mill stream. Different concerns add different amounts of such, and a greater amount of bleaching makes a lower grade of flour appear better. Practically no two concerns grinding wheat into flour grind exactly alike. Some granulate the flour finer than others, and some add a larger proportion of the total break of the wheat berry to their various grades of flour than do others. A difference in the granulation of the flour and in the amount of the total break of the wheat berry contained in the flour affects very materially the appearance of the flour. The quality and characteristics of the flour cannot be determined by the paddle test, and respondent by this test cannot maintain uniformity of brands or grades. The grade and quality of all flours are determined by their chemical analysis. The quality or grade of the flour is not changed by mixing self-rising ingredients with it and running it through the equipment in respondent's plant. From time immemorial there have been plants buying and blending flour but not grinding wheat into flour, which plants were known as blending plants and not known as mills or milling companies, or manufacturers of flour. Such terms have from time immemorial been applied in the flour trade only to the grinding of the grain.

Paragraph Seven: Respondent represents himself as "Tennessee Grain Company And Tennessee Milling Company. Receivers And Shippers Of Grain. Manufacturers Of Soft Wheat Flour." In the letters, circulars and literature which respondent circulates among the trade in his efforts to sell flour he makes such statements as the following:

> "We have no salesmen in your territory and can make very close prices on flour orders sent in direct."

And:

> "Eventually you will see the best flour is Tennessee."

Findings as to the Facts and Conclusion

And:

"'Tennessee' plain flour and 'Diamond T' self-rising guaranteed to be as good as any flour regardless of brand or price."

Paragraph Eight: The containers for respondent's flour have on them the trade name under which he sells the flour as "From Tennessee Grain Company And Tennessee Milling Company." In addition there appears upon the containers for the flour the brand name and a designation of the type of the flour as follows: "Commodore. Superlative Patent Flour," "White Gold. Best Fancy Patent Flour." "Diamond T. Self-Rising Superlative Flour," "Golden South. Superlative Patent Self-Rising Flour." There is no such term as "process flour" or "processed flour" in the flour or milling industry. Such terms have no significance in the trade. Neither the word "process" nor the word "processed" appears anywhere on any of respondent's bags, labels, or containers, or in any of his literature as descriptive of any of his flour. The term "process flour" or "processed flour" could only mean flour handled twice, run through the mixing machines and packed in sizes suitable for the family trade, or a low grade or off grade flour that has been mixed with good flour to bring the grade up to a suitable standard.

Paragraph Nine: When the term "mills" or "milling company," or "manufacturer of flour" is used in the flour industry it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour. When either of such is used in the name of or in connection with the name of the concern that is on the container in which the flour is sold, it indicates to dealers and consumers that the flour contained in the package was ground from wheat by the concern whose name appears upon the package. And many dealers and consumers prefer to buy flour that comes directly from a concern that ground the wheat into flour rather than from one that bought the flour from a grinding concern, mixed it and packed it and then resold it, because they think that they get from such grinding concern a more uniform product or get a better product for less money because of the elimination of a middleman's profit or costs. Many persons, dealers and consumers, have been buying respondents' flour believing him to be, because of the use of such words or terms in the name under which he does business and because of his repre-

sentation that he is a "Manufacturer of Flour," a concern grinding wheat into flour. The crushing of wheat into flour is one of the oldest of human occupations. The act of crushing the grain into flour has always been known as milling, and the concern performing such act as a "mill," "miller" and "milling company," and this is still the significance of such terms to a large part of the trade and the consuming public. Respondent's use of such words or terms in the name under which he does business and his representation that he is a manufacturer of flour tend to and do divert trade to respondent from concerns actually grinding wheat into flour and selling in the States in the Southeastern section of the United States and from concerns engaged in the same character of business as respondent and selling in the said section of the United States, but that do not use such words or terms in the names under which they do business or represent that they are manufacturers of flour.

CONCLUSION.

The practices of respondents under the conditions and circumstances set forth in the foregoing findings of fact are to the prejudice of the public and respondents' competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

C. W. Hunt,
Chairman.

(Seal)
Dated this 16th day of
April, A. D. 1931.
Attest:
Otis B. Johnson,
Secretary.

United States of America
BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission held at its office in the City of Washington, D. C., on the 16th day of April, A. D. 1931.

Commissioners:

C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of D. V. Johnson, doing business under the name of Tennessee Grain Company and Tennessee Milling Company.	Docket No. 1598.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission the answer of respondent thereto, stipulation as to the facts, briefs and arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that respondent has been and is using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties and for other purposes,"

It Is Now Ordered, that the respondent D. V. Johnson, doing business under the name of Tennessee Grain Company And Tennessee Milling Company, his representatives, agents and employees, do cease and desist from carrying on the business of selling flour in commerce among the several states of the United States under a trade name or any other name which includes the words "Milling Company" or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that he is a manufacturer of flour, or

that the flour sold by him comes direct from manufacturer to purchaser, unless and until respondent actually owns and operates or directly and absolutely controls a factory or a mill wherein is made by grinding or crushing the wheat berry any and all flour by him sold or offered for sale under such title or name, or by or through any advertisement or other representation that he is a manufacturer of flour.

It Is Further Ordered, that the respondent above named, within sixty (60) days from the date of the notice hereof, file with the Commission a report in writing, setting forth in detail the manner in which this order has been complied with and conformed to.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

United States of America
BEFORE FEDERAL TRADE COMMISSION

In the Matter of Nashville Roller Mills, a Corporation, John Schultz, as President, Louis Baujan, as Vice President, and Virgil S. Tupper, as Secretary and Treasurer, and each individually.	Docket No. 1599.

COMPLAINT.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Nashville Roller Mills; John Schultz, as President and individually; Louis Baujan, as Vice President and individually; and Virgil S. Tupper, as Secretary and Treasurer and individually, hereinafter referred to as respondents, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondent, Nashville Roller Mills, is a corporation organized, and doing business, under the laws of the State of Tennessee, with its principal place of business in the City of Nashville, State of Tennessee. The respondents, John Schultz, Louis Baujan, and Virgil S. Tupper, are the President, Vice President, and Secretary and Treasurer, respectively of said corporation.

Paragraph Two: The Nashville Roller Mills is, and has been for three years last past, practicing the acts and things described in the following: It is engaged in purchasing wheat flour from flour millers throughout the middle west, which it causes to be transported to its plant in the City of Nashville, where it is blended and mixed with certain chemical leavening agents, such as baking powder, used to produce the commodity known to the public and in the trade as "self-rising flour." Respondent corporation solicits orders for the blends or mixtures so produced from dealers in States other than

Tennessee and contracts to sell and deliver, and does sell and cause its products to be transported to purchasers outside the State of Tennessee, principally to retail grocers in the southeastern states. It conducts its business, as aforesaid, under the trade names of "Cumberland Valley Milling Company," "Bell Meade Mills" and "The Red Mill." The respondent corporation is in competition with individuals, partnerships and corporations likewise engaged in the business of selling self-rising flour in interstate commerce.

Paragraph Three: Respondent corporation, in carrying on its business as aforesaid, solicits orders and sells its products principally through the mail service. It packs its product under a number of brands, each of the aforesaid trade names. On its letterheads, used in its business correspondence, appears the following:

"NASHVILLE ROLLER MILLS
The Red Mill
Quality Flour."

"CUMBERLAND VALLEY MILLING COMPANY
Flours of Quality
Plain and self-rising."

"THE RED MILL
Self-rising Extra Fancy Patented."

Respondent packs and delivers its product in cotton or other bags on which appear in conspicuous lettering, in connection with the pictures or symbols of this brand, the following:

"From
NASHVILLE ROLLER MILLS
Fancy Patent Flour."

"Supreme Patent Guaranteed
The best Manufactured."

"Manufactured for
from
BELL MEADE MILLS
Fancy Patent Flour."

"Fancy Patent Flour
From Select Winter Wheat."

Complaint

"CUMBERLAND VALLEY MILLING COMPANY
Supreme Patent Flour."

"Manufactured for
From
CUMBERLAND VALLEY MILLING COMPANY
Best Soft Winter Wheat Patent Flour."

"From
THE RED MILL, Makers."

Respondent corporation in its business correspondence makes other representations which have the capacity and tendency to lead dealers and prospective customers to believe that it operated a mill and grinds and manufactures the flour used and sold in its products.

Paragraph Four: The respondent corporations owns no mill or machinery other than devices for mixing flour purchased by it from various millers, with the ingredients indicated for self-rising flour as above described. It grinds no wheat or other cereal and owns and operates no machinery fitted for that purpose.

Paragraph Five: The use in its business by respondent, Nashville Roller Mills, of its corporate name and the trade names as aforesaid, as above described, and representations in its business correspondence as aforesaid, have the capacity and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing its products they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman or any element of cost of a middleman's profits, and to induce purchases of its flour by dealers and prospective purchasers on that understanding and belief; and said practices constitute unfair methods of competition with millers and manufacturers of flour likewise engaged in interstate commerce who grind the flour they offer for sale, alone or mixed as self-rising flour, and with producers and sellers of self-rising flour, likewise engaged in interstate commerce, who do not grind and manufacture but buy and sell flour made by others, in their product, and do not represent themselves to be millers or manufacturers of flour; to the injury of said millers and producers of self-rising flour, in that said practices of respondent tend to take away their business by false representations.

Wherefore, said acts and practices of respondent are all to the prejudice of the public and constitute unfair

methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission on this 20th day of April, A. D., 1929, now here issues this its complaint against respondents.

NOTICE.

Notice is hereby given you, Nashville Roller Mills, John Schultz, Louis Baujan, and Virgil S. Tupper, respondents herein, that the 4th day of June, A. D., 1929, at 10:30 o'clock in the forenoon, is hereby fixed as the time, and the office of the Federal Trade Commission, in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required within thirty (30) days from service of the complaint, unless such time be extended by order of the Commission to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answers and failure to answer (Rule III) provide as follows:

> (1) In case respondent shall desire to contest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.
>
> (2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a

statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 20th day of April, A. D., 1929.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

THE JOINT AND SEPARATE ANSWER OF NASHVILLE ROLLER MILLS, A CORPORATION, JOHN SCHULTZ, INDIVIDUALLY AND AS PRESIDENT THEREOF, LOUIS BAUJAN, INDIVIDUALLY AND AS VICE PRESIDENT THEREOF AND VERNON S. TUPPER (ERRONEOUSLY STYLED IN THE COMPLAINT VIRGIL S. TUPPER), INDIVIDUALLY AND AS SECRETARY AND TREASURER OF SAID CORPORATION—Filed May 20, 1927.

Respondents for answer say:

Answering Paragraph One:

Respondents admit that the Nashville Roller Mills is a corporation chartered and existing under the laws of Tennessee, with its principal place of business at Nashville, Tennessee; that John Schultz is President, Louis Baujan is Vice President, and Vernon S. Tupper (erroneously styled Virgil S. Tupper) Secretary and Treasurer thereof.

Answering Paragraph Two:

1. Respondents admit that the Nashville Roller Mills is now and has been engaged (that is to say manufacturing) self-rising flour, but it is not true that this has been for only three years last past. On the contrary, said respondent has been manufacturing self-rising flour at its present location and with its present plant for more than fifteen years.

2. Respondents deny that said company is engaged merely in blending and mixing self-rising flour, and aver that it is engaged in a milling and manufacturing process, whereby certain materials, by the use of costly machinery, are turned into a finished product known as self-rising flour.

3. Respondents admit that said corporation solicits orders for self-rising flour so manufactured from dealers in states other than Tennessee, and contracts to deliver, an causes its products to be transported to purchasers in other states; but respondents deny that said corporation sells principally to retail grocers in the southeastern states.

4. Respondents admit that said corporation conducts its said business under the trade names "Cumberland Valley Milling Company," "Belle Meade Mills," and "The Red Mill."

5. Respondents admit that said corporation is in competition with others who are likewise engaged in the business of selling self-rising flour, but respondents are without knowledge as to whether said competitors are individuals, partnerships, or corporations, and are without knowledge as to what extent, if any, said competitors are engaged in interstate commerce, and in this connection further state that many, if not all of them, are engaged in the same practices which are denounced as "unfair" in the complaint, and if said practices are unlawful, are not competitors entitled to protection within the meaning of the Federal Trade Commission Act.

Answering Paragraph Three:

1. Respondents deny that said corporation solicits orders and sells its product principally through mail service.

2. Respondents admit that said corporation packs its products under a number of brands.

3. Respondents admit that in the letter heads used the words "Mills," "Milling," and "Manufactured" appear in various combinations, as alleged in the complaint, the further facts being that the respondent corporation, when organized and chartered in the year 1909, operated a wheat grinding plant which was burned in July, 1913, and then rebuilt and since operated as a mill for the manufacture of self-rising flour; and that the wording on said letter heads was such as respondents had a lawful right to use and was and is used without intent to deceive, and did not and does not in fact deceive either the public or its competitors.

4. Respondents admit that said corporation packs and delivers its product in cotton or other bags on which appear in conspicuous lettering in connection with pictures or symbols of this brand the words "Mills," or "Manufactured," as set forth in the complaint, respondents however insisting on the explanation given in subsection 3 of this paragraph, and that the use of said words was and is in good faith and did not and does not deceive either the public or the competitors of said company as above set forth; and further insisting that the processes used are manufacturing in the strictest sense of the word.

5. Respondents deny the conclusion (no facts being stated) that said corporation in its business correspondence makes other representations which have the capacity and tendency to lead dealers and prospective

customers to believe that it operates a mill and grinds and manufactures the flour used and sold in its products.

Answering Paragraph Four:

1. Respondents deny that said corporation owns no mill or machinery other than devices for mixing flour, etc., as alleged in the complaint—the fact being that said corporation owns elaborate and costly machinery, its plant being worth about $100,000.00,—with machinery is used in a manufacturing and milling process.

2. It is true that said corporation now grinds no wheat or other cereal and now owns and operates no machinery fitted for that purpose—that facts being that said corporation was chartered and organized as a wheat grinding mill; that said plant was burned about sixteen years ago; and that it was rebuilt as a mill for the manufacture of self-rising flour, as hereinbefore set out.

3. Respondents further state that the wheat miller—the individual who grinds wheat into flour—does not and cannot manufacture self-rising flour with his wheat grinding machinery, but is compelled to first get his flour, and then by a separate manufacturing process and with separate and different machinery (the same as that used by these respondents) turn his raw flour into self-rising flour.

Answering Paragraph Five:

1. Respondents deny that the use in its business by said corporation of the corporate and trade names aforesaid, and the alleged representations in its business correspondence (no facts stated) have the capacity and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing its products they are buying direct from a miller and manufacturer of flour, without the intervention of a middleman or any element of cost of a middle man's profit, and to induce purchases of its flour by dealers and prospective purchasers on that understanding and belief.

2. Respondents further deny that they, or any of them, are engaged in any unfair methods of competition with millers or other producers of self rising flour, alleged to be engaged in interstate commerce, and further deny that said practices constitute unfair methods of competition with such millers or makers of self-rising flour as alleged in the complaint.

2-a. Respondents aver that the wheat "miller" does not, and cannot, make self-rising flour by the use of his grinding machinery, but is compelled to first get his raw flour, either by grinding or purchase, and then by a separate milling process and by separate machinery (practically the same as that used by these respondents) turn it into self-rising flour. The "miller" who grinds his own flour has no advantage thereby, for he must absorb the local crop of wheat, which may or may not be good, whereas the so-called "blender" can buy the best flour wherever it is produced, and can buy such flour at actual cost. The explanation of this is that by selling their surplus at actual cost the wheat-grinding millers from whom he purchases are enabled to keep their mills going night and day, thus greatly reducing cost.

2-b. Respondents aver that there is no "middleman's profit" involved unless the self-rising flour which has been manufactured, as aforesaid, in the same way by both "miller" and "blender" is sold through a jobber; and where this is not done, and where the sale is made direct to the retailer, middleman's profits on self-rising flour are in fact eliminated.

2-c. Respondents further aver that the so-called "miller" has no advantage as to cost of manufacture, for it costs him as much to manufacture his raw flour as it does for respondent corporation to buy its raw flour, which it buys very cheaply for the reason hereinbefore stated. The production of self-rising flour is, as aforesaid, a separate milling process, as to which the so-called "miller" has no advantage, but is rather at a disadvantage.

3. Respondents deny that they, or any of them, by reason of the practices alleged in the complaint, have injured said "millers" and manufacturers of self-rising flour alleged to be engaged in interstate commerce, and particularly deny that said practices tend to take away business from them or any of them by false representations; and deny that respondents, or any of them, have been guilty of any false representations by the use of the words "Mill," "Milling," "Manufactured," or any kindred expression, as set forth in the complaint.

4. Respondents deny that said acts and practices are all to the prejudice of the public, and constitute unfair methods of competition within the meaning of said Act, and aver on the contrary that this proceeding, which is in fact (although not intentionally) in the interest of a

few private individuals, is to the injury of the public, and not within the spirit or letter of the Act.

Answering The Whole Complaint, respondents, in addition to the defenses hereinbefore set out, for further defense say:

1. Respondents deny that the complainant, the Federal Trade Commission, has jurisdiction of this proceeding.

2. Respondents deny that this proceeding falls within or is covered by the said Act of Congress creating the Federal Trade Commission.

3. Respondents deny that this is a proceeding in the interest of the public, and insist that the practices described in the complaint do not substantially tend to affect the public to its injury.

4. Respondents insist that this proceeding, so far from being in the interest of the consuming public, is in fact (although not intentionally) in the interest of a few private individuals, competitors of respondents; that the effect of sustaining this proceeding will be to injure the respondents and make their competition less effective, in that they will be charged by said competitors with fraudulent and willfully unfair practices; and that the effect of so reducing the competitive power of respondents will be to ultimately raise the price to the consuming public to its injury.

5. Respondents state that the use of the words "Mill," "Milling," "Manufacturer," etc., has been and is in good faith, and under claim of lawful right; that no fraud or deceit of any kind has been practiced on the public (none being charged in the complaint); that there has been no substitution by respondents of an inferior for a superior article, to the injury and deception of the consuming public; that the self-rising flour of the wheat miller is not manufactured by the use of his grinding mill, but, by the same process as that used by respondents, and the product is in no wise superior to respondents' product, but is more apt to be inferior.

6. Respondents are without knowledge of any producers of self-rising flour (so-called "blenders") who claim to have been injured in competing with respondents by the use of the words "Mills," "Milling," or "Manufactured," and deny that any such actors are its competitors, but allege on the contrary, that the competitors who are objecting to the use of said words by respondents are individuals, firms, or corporations owning wheat grinding mills, but also engaged in the manufac-

ture and sale of self-rising flour in competition with respondents.

With respect to such competitors, respondents insist that they are guilty of the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising flour by the manufacturing process already mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest of and for the protection of competitors who are themselves engaged in the same practices condemned by the complaint.

7. Respondents aver that said company's sales are made chiefly to wholesale grocers who are familiar with its methods, and that none of its customers are in fact deceived or misled into thinking that it operates a wheat-grinding mill, and they aver that it would be no advantage if they did think so, for better self-rising flour can be made by the so-called "blender." The "miller" is to a large extent dependent on the local crop, but respondents can buy wherever the crop is best.

8. Respondents deny that they, or any of them, have represented, or led their customers or the public to believe, that middleman's profits are excluded, etc., as alleged in the complaint. This charge is a mere unwarranted inference or conclusion without facts alleged to support it.

9. Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills, and manufacturing self-rising flour in competition with the respondent corporation, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by respondents and other Nashville manufacturers of self-rising flour, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing in October 1916, handed down an opinion which remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of respondents and other Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that they were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors.

Joint and Separate Answer of Respondents, etc.

10. Respondents for further defense submit that the complainant Federal Trade Commission, after ex parte investigation has prejudged this case on questions of fact which are of vital, if not controlling, importance, in that its authorized agent acting in its behalf has in writing stated that said Commission was of the opinion that respondents are not engaged in a manufacturing or milling process.

Respondents do not charge any bad faith or intentional unfairness on the part of the Commission, but they submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law in this proceeding.

And respondents further submit that if the Federal Trade Commission Act is to be construed as authorizing such procedure such portion of said Act contravenes the Fifth Amendment to the Constitution of the United States, in that the Federal Trade Commission is undertaking to act at the same time as litigant and judge—which is contrary to the fundamental maxim that no man shall be a judge in his own case—but its findings of fact, although contrary to the weight of the evidence, are conclusive if supported by any material evidence, and for this reason a full review of its action by an impartial tribunal is denied, and litigants are thereby deprived of their property without due process of law.

11. Respondents further aver that they have no wish and never have had any wish or intention to use unfair methods in competition, and have never used the words "Mill," or "Manufacture," or kindred words mentioned in the complaint with any intent to deceive or make false representations of any kind, being advised, on the contrary, that said words are truthful and fully authorized under the facts hereinbefore set out; and respondents submit that they should not be required to give up the trade names under which a valuable good will has been acquired; that this would inflict an unnecessary loss and hardship on respondents, and would in no wise benefit the public.

12. Respondents further state that they and other Nashville manufacturers of self-rising and processed flour supply a trade which is accustomed to buy in small quantities, and such service is an economic necessity in said territory, and in the interest of dealers and of the consuming public, and enables consumers to obtain these products at a lower price than would be possible if such service were withdrawn or discontinued.

Joint and Separate Answer of Respondents, etc.

Respondents further aver that all self-rising and processed flour is of the same general type, whether manufactured by the so-called "millers," or the so-called "blenders," and that competition between them can only be determined, and is in fact determined, by three factors, to-wit, price, quality, and service. The grinding of flour in a particular mill is not, and cannot be, a factor.

Wherefore, respondents having fully answered, pray that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville Trust Building,
Nashville, Tennessee.

AMENDED COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Nashville Roller Mills, a corporation; John Schultz, as President and individually; Louis Baujan, as Vice President and individually; and Virgil S. Tupper, as Secretary and Treasurer and individually, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondents, Nashville Roller Mills, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal place of business in the City of Nashville, State of Tennessee. The respondents, John Schultz, Louis Baujan, and Virgil S. Tupper, are the

President, Vice President, and Secretary and Treasurer, respectively, of said corporation and control, manage and direct its business.

Paragraph Two: Respondent, Nashville Roller Mills, is engaged in the business of purchasing various lots and grades of wheat flour from mills located in the middle west which it causes to be transported to its plant in the City of Nashville and there blending and mixing the flour so purchased by it and putting up in sacks and offering for sale the mixtures and blends resulting therefrom, in some cases adding leavening agents such as baking powder to the blends or mixtures producing the commodity known to the public and dealers as "self-rising flour." In the course and conduct of its business as aforesaid said respondent solicits orders for its products in various states other than the State of Tennessee and contracts to sell and does sell and cause to be transported to purchasers outside of the State of Tennessee its products as above described. Said respondent conducts its business as aforesaid, under its name and under the trade names of "Cumberland Valley Milling Company," "Bell Meade Mills" and "The Red Mill." The respondent corporation in said business is in competition with individuals, partnerships and corporations likewise engaged in the business of selling wheat flour, either in plain or self-rising form, in interstate commerce who either manufacture the flour they sell by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour; or purchases the flour they offer for sale, whether as plain or self-rising, and do not in their trade names or otherwise in the conduct of their business use the words "mill," "mills," "miller," or "milling," or otherwise represent that they are engaged in the manufacture of flour as above described. Respondent in carrying on its business as aforesaid solicits orders and sells its products largely to retail grocers through the mail service.

Paragraph Three: Respondent corporation in the conduct of its business as aforesaid packs its product under a number of brands under each of the aforesaid names under which it operates. On its letterheads used in its business correspondence appears the following:

"NASHVILLE ROLLER MILLS
The Red Mill
Quality Flour."

Amended Complaint

"CUMBERLAND VALLEY MILLING COMPANY
Flours of Quality
Plain and self-rising."

"THE RED MILL
Self-rising Extra Fancy Patented."

Respondent packs and delivers its products in cotton or other bags on which appear in conspicuous lettering in connection with the pictures or symbols of the particular brands:

"From
NASHVILLE ROLLER MILLS
Fancy Patent Flour."

"Supreme Patent Guaranteed
The Best Manufactured."

"BELL MEADE MILLS,
Fancy Patent Flour."

"Fancy Patent Flour
From Select Winter Wheat."

"CUMBERLAND VALLEY MILLING COMPANY
Supreme Patent Flour"

"CUMBERLAND VALLEY MILLING COMPANY
Best Soft Winter Wheat Patent Flour."

"From
THE RED MILL, Makers."

Respondent corporation in its business correspondence and in soliciting orders makes other representations which have the capacity and tendency to lead dealers and consumers to believe that it operates a mill and grinds and manufactures the flour sold by it.

Paragraph Four: The respondent corporation owns no mill or machinery other than devices for blending or mixing the lots and grades of flours purchased by it from millers as above described and adding leavening agents. It manufactures no flour by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour and owns or operates no mill or machinery fitted for that purpose.

Amended Complaint

Paragraph Five: The use in its business by the respondent, Nashville Roller Mills, of its corporate name and the trade names as aforesaid and representations in its business correspondence and otherwise as aforesaid have the capacity and tendency to lead dealers and consumers of plain and self-rising flour to believe that in purchasing its products they are buying direct from a miller or manufacturer of flour as above described and without the intervention of a middleman or any element of a middleman's profit, and induce purchases of its flour by dealers and consumers on that understanding and belief; and said representations constitute unfair methods of competition with millers or manufacturers of flour likewise engaged in interstate commerce who make, as above described, the flour they offer for sale and with sellers of flour likewise engaged in interstate commerce who do not so manufacture but they buy and sell flour made by others and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and sellers of flour in that said representations of respondent are false and misleading and tend to take away their business.

Wherefore, said acts and practices of said respondents are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission on this 4th day of September, A. D., 1929, now here issues this its amended complaint against respondents.

NOTICE.

Notice is hereby given you, Nashville Roller Mills, and John Schultz, Louis Baujan, and Virgil S. Tupper, respondents herein, that the 4th day of October, A. D., 1929 at 2 o'clock in the afternoon is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required on or before said date, to file with the Commission an answer to the complaint. If answer is filed appearance on that date will not be required and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

(1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the complaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegations of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter, and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to appear to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, The Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 4th day of September, A. D. 1929.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

ANSWER TO AMENDED COMPLAINT—Filed Oct. 3, 1929.

The Joint and Separate Answer of Nashville Roller Mills, a corporation, John Schultz, as President thereof Louis Baujan, as Vice President, Vernon S. Tupper (erroneously sued as Virgil S. Tupper), as Secretary & Treasurer thereof, and of each individually, to the amended complaint in this cause filed against them.

Respondents for answer say:

1. It is admitted that respondent Nashville Roller Mills is a corporation under the laws of Tennessee, with its principal place of business at Nashville; that respondents John Schultz, Louis Baujan, and Vernon S. Tupper are President, Vice President, and Secretary & Treasurer, respectively, of said corporation, and control its business.

2. It is admitted that respondent Nashville Roller Mills is now, and has for many years been engaged in the manufacture of self-rising and processed flour in the City of Nashville, but it is denied that said business and the process of manufacturing said products are correctly described in the complaint.

It is admitted that said respondent contracts to sell, and sells and delivers its products outside the State of Tennessee.

3. It is admitted that respondent corporation is in competition with others in making and distributing said product, but respondents are without knowledge as to whether these competitors are individuals, partnerships, or corporations, or as to whether they are engaged in Interstate Commerce, or as to whether they manufacture the flour sold by grinding or crushing wheat, or as to whether they purchase the flour they offer for sale, and do not in their trade names or otherwise use the term "Mill", "Miller", or "Milling", or otherwise represent that they are engaged in the manufacture of flour, etc., as alleged in the complaint.

4. Respondent corporation solicits orders for its products, both through the mail service and through brokers, but it is denied that said respondent sells its products largely to retail grocers through the mail service, as alleged in the complaint.

5. Respondents deny that those of their competitors who are so-called "Millers" grind all the self-rising flour which they sell in competition with respondent corporation, and on the contrary aver that they, to a greater or

less extent, buy flour from others, which they make into self-rising flour by the same method used by respondent corporation, and put out this product in their own bags and under their own brands; and respondents aver that the same is true with respect to "processed" flour.

6. It is admitted that in the conduct of its business, as aforesaid, respondent corporation solicits orders and sells its products under the name of "Nashville Roller Mills," "Cumberland Valley Milling Company," "The Red Mill," and "Belle Meade Mills."

7. Respondents deny that the letter-heads, bags, and advertising matter, and the statements therein appearing, are correctly described in the complaint.

8. Respondents admit that the words "Mills", "Milling", and "Manufacturer" are used in connection with the letter-heads, advertising matter, and bags in the conduct of said corporation's business.

9. Respondents admit that there are no corporations or other organizations corresponding to the trade names "Cumberland Valley Milling Company," "The Red Mill," and "Belle Meade Mills," and allege that the respondent Nashville Roller Mills is doing business under these various trade names, which is a customary practice and well recognized business usage.

Respondents deny that in its business correspondence, and in soliciting orders, said corporation makes other representations which have the capacity and tendency to lead dealers and consumers to believe that it operates a mill and grinds and manufactures the flour sold by it, as alleged in the complaint.

10. Respondents deny that said corporation owns or operates no mill or machinery other than certain mixing devices, etc., and aver that it owns machinery adapted to the manufacture of self-rising and "processed" flour, which is both a milling and a manufacturing operation, the value of respondent corporation's plant being approximately $....., and of its machinery and equipment approximately $....., and of its investment capital, etc., approximately $.....; or a total investment of approximately $..... Respondent corporation's plant has a capacity of about ..... barrels a day on a twenty-four-hour basis. In 1928 said respondent corporation did a business of approximately $.....

It is true that said respondent corporation grinds no wheat or other cereals, and owns no wheat grinding machinery.

Answer to Amended Complaint

11. Respondents deny that the use of the aforesaid trade names, with the word "Mills," or "Milling," separately, or in combination with the term "Manufacturer," or any other statements on respondent corporation's letter-heads, bags, etc., has any tendency to make dealers or prospective customers or consumers believe that they are buying flour from a miller and manufacturer without a middle man's profit, etc., as claimed in the complaint.

Respondent Nashville Roller Mills shows that it acquired its corporate name many years ago, having been originally chartered and organized in 1909, as a wheat grinding mill; that said plant was destroyed by fire about sixteen years ago, to-wit, in July, 1913, and was then rebuilt, and has since been operated as a mill for the manufacture of self-rising and processed flour; that the use of the word "Mills" is pursuant to a corporate franchise, lawfully granted to respondent corporation some twenty years ago, by the State of Tennessee.

12. Respondents deny that any false representations are made by the use of the words aforesaid, and deny that these alleged practices, if proven, constitute any unfair competition with millers and makers of self-rising flour, or processed flour, alleged to be likewise engaged in Interstate Commerce, etc.

13. Respondents deny that said alleged actions have the effect of taking away business improperly from said alleged competitors, and on the contrary aver that said conduct, if proven, could have no such possible effect.

(a) Because the so-called "Millers" do not and cannot make self-rising flour with their grinding mills, but must first obtain raw flour, either by grinding it, or by purchasing the same, and then turn it into self-rising flour.

(b) Because said "Millers" obtain no advantage from making self-rising flour from the flour which they grind, but are rather at a disadvantage, both as to cost of production of the raw flour, and as to its quality, as will be shown at the hearing.

(c) Because self-rising and processed flour, no matter by whom made or sold, is essentially the same product destined for consumption in a particular region, and the buyers of such flour are governed by only three factors, to-wit: price, quality, and service.

(d) Because there is no pretense in the complaint that self-rising or processed flour made by the so-called

"blender," and there is no deception of the public by substituting an inferior for a superior article.

14. Respondents aver that those of said Nashville Roller Mills' competitors who are "millers" follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors who are themselves engaged, as against respondent corporation, in the same practices condemned by the complaint.

15. Respondents deny, as hereinbefore set out, that the use of the words "Mills," "Milling," or "Manufacturer," misleads, or has a tendency to mislead, any substantial portion of the purchasing or consuming public, in that they may be led to believe they are buying from one who grinds his wheat. But respondents are willing to cut off the possibility of deceiving, or misleading, any purchaser or customer through the use of the words above quoted, and to this end have heretofore offered, and hereby offer, to place on said corporation's letterheads, bags, invoices, etc., in conspicuous lettering the words:

"NOT GRINDERS OF WHEAT"

Respondents believe and state that said corporation is a "miller" and a "manufacturer"—in that it turns out a distinct product by the use of milling machinery—but it is not, and does not claim to be, a grinder of wheat, and is willing that this be distinctly and unequivocally stated.

16. Respondent corporation, under the trade names aforesaid, has acquired a valuable good will, and respondents insist that it would be unjust and inequitable to deprive said corporation of this.

Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville Manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full

hearing, in October, 1916, handed down an opinion, which remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors, thereby depriving respondent corporation of the valuable good will which it has built up.

17. Respondents deny that this proceeding is in the interest of the public, as claimed in the complaint, and allege on the contrary that said proceeding is actually (though not intentionally) in the interest of a few private individuals, competitors of the so-called "blenders," and that its tendency and effect, if sustained, will be to injure and exploit the consuming public for the benefit of private individuals. Respondents insist that the practices described in the complaint do not substantially tend to affect the public to its injury; deny that this proceeding falls within or is covered by the Act of Congress creating the Federal Trade Commission; and deny that the Complainant, Federal Trade Commission, has jurisdiction of this proceeding.

18. Respondents submit that Section 5 of the Federal Trade Commission Act, and the procedure thereunder, violate the Fifth Amendment to the Constitution of the United States, in that said Federal Trade Commission is not and cannot be impartial, since it acts both as plaintiff and judge in the same proceeding, and because its findings, however erroneous, and however opposed to the weight of evidence, are binding and conclusive on review if supported by any material evidence, and thus a full review by an impartial tribunal is denied, and the litigants before said Commission are thereby deprived of due process of law.

Respondents further submit that the Complainant, Federal Trade Commission, after ex parte investigation, has prejudged this case on questions of fact, which are of vital, if not controlling importance.

Respondents do not charge any bad faith, or intentional unfairness, on the part of the Commission, but submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United

States, and that these respondents are thereby denied due process of law in this proceeding.

And now having fully answered, respondents pray that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville
Trust Bldg.
Nashville, Tennessee.

United States of America
BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 19th day of October, A. D., 1929.

Commissioners:
Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matters of	
Royal Milling Co., et al.,	Docket No. 1597
Tennessee Grain Co.,	Docket No. 1598
Nashville Roller Mills,	Docket No. 1599
Snell Milling Co.,	Docket No. 1600
Watauga Milling Co., et al.,	Docket No. 1601
State Milling Co., et al.,	Docket No. 1602
Cherokee Mills Co., et al.	Docket No. 1604

ORDER.

The above-entitled matters coming on for consideration by the Commission on the suggested solutions of the issues raised in the complaints filed July 12, 1929, by Thomas H. Malone, counsel for respondents, and the Commission now being fully advised in the premises,

It Is Ordered that said suggested solutions be considered at the time of final argument on the merits.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

STIPULATION OF COUNSEL.

In the above styled matter it is stipulated and agreed between Baldwin B. Bane, Esq., counsel for Federal Trade Commission, and Thomas H. Malone, counsel for respondents, and subject to the approval of the Federal Trade Commission:

I. That all evidence taken in the cause of Francis J. McCarthy, doing business under the names of Wautaga Milling Company, etc., (Docket No. 1601), and especially the testimony of the witness Vernon S. Tupper, appearing at pages 1037, et seq., of the record in said cause, Docket No. 1601, may be considered as part of the evidence herein.

II. That the matters hereinafter covered by further stipulation in this cause may be considered in said cause of Francis J. McCarthy, doing business, etc. (Docket No. 1601), and also in Docket No. 1597, Docket No. 1598, Docket No. 1600, Docket No. 1601, Docket No. 1602, and Docket No. 1604, in so far as applicable to the general issues raised under the pleadings therein.

III. That in addition to the evidence in said cause (Docket No. 1601), the following additional facts are stipulated, with reference to this cause:

1. That respondent Nashville Roller Mills is a corporation, chartered under the law of Tennessee in the year 1908, with respondent John Schultz as its President, Louis Baujan as its Vice-President, and Vernon S. Tupper as its Secretary & Treasurer, and that from 1908 until July, 1913, said corporation operated a wheat-grinding plant, which was burned in July, 1913, and then rebuilt as a plant for the making of "self-rising" and "processed" flour, and has since been operated as such, in the manner and under the conditions shown in the testimony of the witness Vernon S. Tupper in Docket No. 1601.

2. That said corporation operates under the following trade names: "Cumberland Valley Milling Company", and "Belle Meade Mills", and that the Nashville Roller Mills is also called "The Red Mill", but this is merely a descriptive term or "nick-name."

3. That the following brands are put out by said Nashville Roller Mills:

"Rising Sun"—"Patent Self-rising."
"Red Feather"—"Patent Self-rising."
"Gloria"—"Short Patent Plain."

Stipulation of Counsel

"White Wings"—"Patent Plain."
"Conqueror"—"Patent Plain."
"Mytyfyne"—"Extra Fancy or Cut off Self-rising."

4. That the following brands are put out by said corporation under the trade name "Cumberland Valley Milling Company":

"Lady Clair"—"Patent Self-rising."
"Star Dust"—"Patent Self-rising."
"Ace of Aces"—"Short Patent Plain."
"Spinning Wheel"—"Patent Plain."
"Hi-Lo"—"Extra Fancy or Cut Self-rising."

5. That the following brands are put out by said corporation under the trade name "Belle Meade Mills":

"Nightengale"—"Patent Self-rising."
"Brides"—"Patent Self-rising."
"Thistledown"—"Short Patent Plain."
"Ruby Red"—"Patent Plain."
"Red Ribbon"—"Patent Plain."
"Lullaby"—"Extra Fancy or Cut Off Self-rising."

6. That exhibits 1 to 7, inclusive, to this stipulation, are letters or advertisements of said corporation—said advertisements having appeared in the Nashville Tennessean (a daily newspaper) July 11, 1926, and said letters having been written to customers, or prospective customers, at the date in each case shown herein.

7. That exhibits 8 to 25, inclusive, hereto, show the various sacks, bags, and brands used by respondent corporation in the operation of its business.

8. That exhibit 26 hereto is a photograph, showing an exterior view of the plant of said corporation. Exhibit 27 is a photograph, showing an interior view of a portion of the first floor—packers, bins, etc., as thereon indicated. Exhibit 28 is a photograph of another portion of the first floor of the plant, showing "self-rising" mixers and elevators, as thereon indicated. Exhibit No. 29 is a photograph, showing a view of the second floor of said plant, with various spouts, bins, etc., as thereon indicated. Exhibit No. 30 (a plat made by Coats & Burchard Co., of Chicago) shows the floor plan, elevators, etc., of said plant.

9. That of the flour which goes through the processes already described, in its plant, and is afterwards sold to

the trade, approximately 57% is "self-rising" and approximately 43% is "processed."

10. That said corporation markets its products chiefly to jobbers, or wholesalers, by solicitation of salesmen and through the mail, employing one salesman in the City of Nashville and seven outside of Nashville.

11. That the present reproduction value of the plant and equipment of said corporation is approximately $155,000.00, and that the whole investment is approximately $310,000.00.

12. That the number of barrels sold in the year 1929 was 315,596, and the amount of business in dollars and cents was $2,170,036.01.

13. That the price of wheat, as fixed by the St. Louis wheat market, is a factor which enters into the price of flour in the Southeastern territory, and is so regarded by operators of wheat grinding mills as well as by operators of the plants for the making of "self-rising" or "processed" flour in Nashville, and by wholesale and retail merchants in said Southeastern territory.

14. That said corporation, in carrying on its business, buys and sells in Interstate Commerce.

15. That in response to the request made in the cross-examination of the witness Vernon S. Tupper, to procure information with regard to the advantage over mills North of the Ohio River and West of the Mississippi River by reason of milling in transit privilege, etc. (Record in Docket No. 1601, pp. 1105, et seq.), said witness wrote letters to Sparks Milling Co., Terre Haute, Ind., Canadian Mill & Elevator Co., El Reno, Okla., Loudonville Milling Co., Loudonville, Ohio, Wichita Flour Mills Co., Wichita, Kans., Schultz Baujan & Co., Beardstown, Ill., and Maney Milling Co., Omaha, Neb., requesting information as to carload, and less than carload, rates, to Atlanta, Ga., Montgomery, Ala., and Spartanburg, S. C. The replies submitted by the above named mills are tabulated as follows:

To	From Beardstown		Wichita		Loudonville		Omaha		El Reno		Terre Haute	
	CL	LCL	CL	LCL	CL	LCL	CL	LCL	CL	LCL	CL	LCL
Atlanta	50c	62c	65½	1.34½	51	61c	52	52	61	1.34½	50	55½c
Montgomery	42½	59½	58c	1.32	46½	61c	44½	49½	53½	1.32	42½	53
Spartanburg	58c	74c	73½	1.47	53	67½	60	64½	70½	1.48½	58	70

IV. That the Federal Trade Commission wrote this respondent corporation, and also the respondents in

Docket 1597 (Royal Milling Company) Docket 1598 (Tennessee Grain Co. and Tennessee Milling Co.), Docket 1600 (Snell Milling Co.), Docket 1601 (Watauga Milling Co.), Docket 1602 (State Milling Co.), Docket 1604 (Cherokee Mills), Docket 1607 (Old Hickery Mills), Docket 1617 (Southern Milling Co.), and also Mero Mills, (which, it is stipulated, is the same Mero Mills mentioned in the testimony of the witness Thomas E. Snell in Docket 1601, at pages 934, et seq., of the record), a letter similar in form to respondents' exhibit 68, as shown in the testimony of the witness Vernon S. Tupper in Docket No. 1601, at page 1039 of the record, requesting from each a list of twenty-five customers; that nine of the above named concerns complied with said request; and that from the names so furnished the Federal Trade Commission obtained the twenty-five merchants or dealers, who were examined in chief on behalf of the Commission in said cause, Docket No. 1601, with the exception of the following two witnesses—Walter Cunningham and C. S. Ragland.

V. That to prevent the expense, delay and trouble incident to a separate trial of this cause, the same may be heard and determined by the Commission in connection with said cause of Francis J. McCarthy, doing business, etc., Docket No. 1601,—it being agreed that the evidence introduced in said cause (Docket No. 1601) may be looked to by either part as if taken in this cause, and with respect to this respondent corporation, except in so far as changed by this stipulation, and that the record therein shall constitute part of this record.

Thomas H. Malone,
for Respondent.
Baldwin B. Bane.

United States of America

BEFORE THE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D. 1931.

Commissioners:

C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of Nashville Roller Mills, a corporation, John Schultz, as President, Louis Baujan, as Vice-President, Vernon S. Tupper, as Secretary and Treasurer and each individually.	Docket 1599.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served an amended complaint upon respondents above named charging them with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

The respondents having entered their appearances and having filed their answer herein, a stipulation as to the facts was entered into between counsel for the respondent and counsel for the Commission in which it was stipulated and agreed that the Federal Trade Commission should take such stipulation as to the facts in lieu of testimony.

Thereupon this proceeding came on for final hearing on the briefs submitted by counsel for the Commission and counsel for the respondents and argument by counsel for the Commission and counsel for the respondents, and the Commission having duly considered the record and being fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

Paragraph One: Respondent, Nashville Roller Mills, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee.

Findings as to the Facts and Conclusion

The respondents, John Schultz, Louis Baujan and Vernon S. Tupper, are the President, Vice-President and Secretary and Treasurer respectively of said respondent corporation and conduct, manage, control and direct its business. Respondents' place of business is located in Nashville, Tenn. Respondent, Nashville Roller Mills, conducts business under its own name and under the trade names of Cumberland Valley Milling Company, Belle Meade Mills, and The Red Mill, the last of which names is largely used in connection with the name Nashville Roller Mills as a descriptive term. Respondent, Nashville Roller Mills, is engaged in the business of buying flour from concerns that grind wheat into flour and then mixing such flours, in some instances adding phosphate, and in other instances adding salt, soda, and phosphate, which makes the flour ready for use without the addition of baking powder, and thus gives to it the name of self-rising flour. It then packs the flour in bags under brands of its own or its trade names and sells it to dealers located in various states of the United States, but particularly in the Southeastern States. Respondent buys the flour from concerns grinding wheat into flour and located at various points throughout the United States. This flour is shipped to it at Nashville, Tennessee, from which point it ships the flour to its customers. In the course and conduct of its business respondent is in competition with other corporations, partnerships and individuals engaged in the sale of flour in interstate commerce. From 1908 until July 1913 respondent corporation operated a plant grinding wheat into flour. This plant was burned in July 1913. Respondent corporation did not rebuild a plant to grind wheat into flour after this fire but built and has since operated a plant for conducting a business as described above.

Paragraph Two: Respondent corporation puts the flour which it buys from concerns located at various points throughout the United States in what is called a batch mixer, where it is stirred up and mixed together. Usually but not always two or more flours are so mixed or stirred up together. If the flour is to be self-rising there is added in this mixer the correct proportions of salt, soda, and phosphate. If it is not to be self-rising a little phosphate is added in the mixer. The flour is then run from this batch mixer into bins, from which it goes to a draver feeder which feeds the flour into elevator cups, which carry it to the reel or sifter, from whence it goes after being sifted into hopper bins, and thence to

the packer where it is packed into bags of the desired sizes. There is no grinding process in the operation. Respondent corporation sells from five to six brands under each trade name, but each brand does not represent a different grade or quality of flour. It takes from 10 to 15 minutes to run the flour through the equipment used by respondent corporation. The cost of the machinery in such a plant as the respondent corporations, having a capacity of 3,000 barrels a day on a 24-hour run, is approximately $20,000 to $25,000, and the total investment approximately $150,000 to $200,000. The present replacement value of the plant and equipment of respondent corporation is approximately $155,000.

Paragraph Three: The grinding of wheat into flour has developed by various steps until today it has become a refined, complex, and scientific process. Roughly, the operations which constitute the process are: (1) cleaning and otherwise preparing the grain for grinding; (2) the grinding or reduction of the grain; (3) the bolting or sifting operation; (4) purification and preparation of the product by blowing air through it, adding phosphate, bleaching agents, etc. The modern method of grinding wheat substitutes for the single grinding between millstones a succession of grindings between several sets of iron or porcelain rollers. The wheat when received at the mill is unloaded into elevators or bins, and is thoroughly screened and dry cleaned and scoured by machines especially adapted for that purpose. This process itself is quite complicated, requiring a great deal of machinery. The wheat is analyzed and graded and then tempered and conditioned, preparatory to being ground. It is then passed through the rollers, each passage through a pair of rollers being called a break, and different concerns using different numbers or breaks. After each break the product is sifted or bolted, and the results of the siftings go into various streams, which are carried to other sets of rollers where they are again crushed or broken, the process being a continuous operation. A five break mill has eighteen spans of rolls and thirty-two separations. Each break effects a mechanical separation. The bolting or sifting separates the results of the breaks into various streams and products, such as flour, middling, offals, bran, shorts, etc. The bolting or sifting machine is commonly referred to as a reel. After the flour has gone through the rolls it is again bolted or sifted, and then sent to the packing room. The flour is milled to definite standards in order to insure uniformity. The

wheats for the various brands of flour made by the mill are selected by the chemist and the superintendent from reports which are on file in the superintendent's and chemist's offices, showing the characteristics and chemical constituents of the wheats. Concerns grinding wheat into flour are known as "Manufacturers of Flour." Bolting or shifting has been done by the concerns grinding the wheat into flour in this country from the earliest times. This number of boltings or siftings differs in different mills, and is of importance in determining the appearance of the flour. Bolting or sifting is but a part of the process of preparing the flour. Concerns grinding wheat into flour bleach the flour, the bleaching agent being added on the mill stream. This bleaching matures or ages the flour, thus improving its baking qualities, and whitens it. Concerns grinding wheat into flour blend flours by a blending of the wheats after a chemical analysis of such wheats, and by blending the various streams of flour produced by the different breakings of the wheat berry between the various rolls in the mill. Concerns grinding wheat into flour maintain a laboratory and an experimental mill in charge of a chemist, in which the wheats and flours are analyzed and tested in order to determine their various characteristics, such as gluten content, protein content, moisture content, ash content, etc., in order to keep each of the brands of flour put out by such concerns uniform. It is only from chemical tests that such contents of the flour can be determined and the uniformity of each brand maintained. These characteristics determine the grade and quality of the flour. Unless these characteristics of the flour are maintained practically uniform in each brand of flour, the flour cannot be kept up to one standard. Concerns grinding wheat into flour are very jealous of their grades and brands, and guard and protect them with great care. All mills in the process of grinding the wheat and preparing the flour make or produce several grades of flour. These are, in the order of the best and highest priced grades: patent flour, which means that part of the stream of flour which is left after taking off a greater or less percent of the inferior flour—it is the best flour made by the mill; straight flour, which means one hundred percent flour, all the flour that is extracted from the wheatberry; clear flour is the flour taken off by the mill after the patent flour has been removed; low grade flour designates all of the lowest grades made by the particular mill. These terms indicate with different mills' flours of widely different qualities. The cost of the machinery for a concern

grinding wheat into flour with a capacity of about 3,000 barrels a day is about $600,000, and the total investment between 1,000,000 and $1,500,000. The time required for preparing the wheat and producing the flour by such a concern is from eight hours to fifty or sixty hours, due to differences in time required for tempering the wheat. But if the tempering time is excluded, the time required is from a half hour to one and a half hours, depending upon the number of breaks and boltings used by the concern.

Paragraph Four: Practically all concerns grinding wheat into flour add phosphate to the flour on the mill stream, that is, as the flour is run through the mill. This addition is for the purpose of whitening the baked product and counteracting an overdose of soda. Self-rising flour is flour to which there has been added in correct proportions salt, soda, and phosphate, so that the flour is ready to use without the addition of baking powder by the cook. It is particularly adapted to the making of biscuits. A formula for mixing self-rising flour was discovered by Professor Liebig about seventy-five years ago. The self-rising flour business was originated or begun in Nashville, Tennessee, by a Dr. Owsley. He operated under the name Owsley Flour Company and sold through the Southeastern States. This company was succeeded by the Ford Flour Company about 1897, which concern is still in existence and selling self-rising and plain or phosphated flour throughout the South. The concerns originating of self-rising flour in Nashville and not grinding wheat into flour did not call themselves mills or milling companies, or manufacturers of flour. Most of those actually grinding wheat into flour and selling in the Southeastern States mix and sell self-rising flour, and such is usually produced directly from the mill stream—that is, by running the mill stream directly into mixers where the self-rising ingredients are added before the flour is finally bolted and packed. Respondent corporation sells in competition with those actually grinding wheat into flour, and in competition with those engaged in the same character of business as respondent corporation and who do not represent themselves as mills or milling companies, or manufacturers of flour.

Paragraph Five: Nashville, Tennessee, is the center of the flour industry in the South. There are several concerns located there grinding wheat into flour, and other concerns used to be located there that ground wheat into flour. There are approximately 170 concerns actually

grinding wheat into flour and selling in the Southeastern territory.

Paragraph Six: Different concerns grinding wheat into flour and different amounts of phosphate and bleaching agent to the flour on the mill stream. Practically no two concerns grinding wheat into flour grind exactly alike. Some granulate the flour finer than others, and some add a larger proportion of the total break of the wheat berry to their various grades of flour than do others. The quality or grade of the flour is not changed by mixing self-rising ingredients with it and running it through the equipment in respondent corporation's plant. From time immemorial there have been plants buying and blending flour but not grinding wheat into flour, which plants were known as blending plants and not called or known as mills or milling companies, or manufacturers of flour. Such terms have from time immemorial been applied in the flour trade only to the grinding of the grain.

Paragraph Seven: Respondent corporation represents itself as "Nashville Roller Mills. The Red Mill. Quality Flour;" "Cumberland Valley Milling Company. Flours of Quality. Plain and Self-Rising;" "Belle Meade Mills. Quality Flour;" "The Red Mill. Flours of Quality." In the letters, circulars and literature which respondent corporation circulates among the trade in its effort to sell flour it makes such statements as the following:

> "The May option in wheat has been very interesting—that is to those equipped with steady nerves and able to withstand shock. The last days of the week has seen a bewildering series of flights and nose dives, very spectacular but not noticeably soothing.
>
> "But May wheat, thank heaven, has gone into this discard. True, the old crop has a few weeks of life left, but the new crop will now have the spotlight. * * *
>
> "Be they never so abstemious, the people are going to consume a whole lot of flour before new crop wheat is to be had; and you and I would be remiss should we fail to continue to function with diligence and effectiveness. May we have your active backing to the end that this coming month of June may be prolific, not only for brides but particularly in volume of business on Red Mill flours."

Findings as to the Facts and Conclusion

And:

"Pending the time when new wheat is actually on the market, the trade would do well to bear in mind that old wheat stocks—and it is from old wheat exclusively whence our supplies of flour for the ensuing several weeks must come—are low, unusually low. Under the circumstances, it is scarcely likely that any severe break will develop for quite a bit of a while."

Paragraph Eight: The containers for respondent corporation's flour have on them the name under which it is selling the particular flour such as "From Nashville Roller Mills," "From Cumberland Valley Milling Company," "From the Red Mill, Makers," "Manufactured For From Belle Meade Mills." In addition there appears upon the containers for the flour the brand name and a designation of the type of the flour such as "Rising Sun. Superlative Self-Rising Flour," "Gloria. Supreme Patent. The Best Manufactured," "Bride's. Superlative Self-Rising Flour," "Spinning Wheel. Best Soft Winter Wheat Patent Flour," "Ace of Aces. Supreme Patent Flour," "Conqueror. Fancy Patent Flour." There is no such term as "process flour" or "processed flour" in the flour or milling industry. Such terms have no significance in the trade. Neither the word "process" nor the word "processed" appears anywhere on any of respondent corporation's bags, labels or containers, or in any of its literature as descriptive of any of its flour. The term "process flour" or "processed flour" could only mean flour handled twice, run through the mixing machines and packed in sizes suitable for the family trade, or a low grade or off grade flour that has been mixed with good flour to bring the grade up to a suitable standard.

Paragraph Nine: When the term "mills" or "milling company," or "manufacturer of flour" is used in the flour industry it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour. When either of such is used in the name of or in connection with the name of the concern that is on the container in which the flour is sold, it indicates to dealers and consumers that the flour contained in the package was ground from wheat by the concern whose name appears upon the package. And many dealers and consumers prefer to buy flour that comes directly from a concern that ground the wheat into flour rather than from one that bought the flour from a grind-

ing concern, mixed it and packed it and then resold it, because they think that they get from such grinding concern a more uniform product or get a better product for less money because of the elimination of a middleman's profit or costs. Many persons, dealers and consumers, have been buying respondent corporation's flour believing it to be, because of the use of such words or terms in the names under which it does business and because of its representation that it is a manufacturer of flour, a concern grinding wheat into flour. The crushing of wheat into flour is one of the oldest of human occupations. The act of crushing the grain into flour has always been known as milling, and the concern performing such act as a "mill," "miller" and "milling company," and this is still the significance of such terms to a large part of the trade and the consuming public. Respondent corporations use of such words or terms in the names under which it does business and its representation that it is a manufacturer of flour tend to and do divert trade to respondent corporation from concerns actually grinding wheat into flour and selling in the states in the Southeastern section of the United States, and from concerns engaged in the same character of business as respondent corporation and selling in the said section of the United States, but that do not use such words or terms in the names under which they do business or represent that they are manufacturers of flour.

CONCLUSION.

The practices of respondents under the conditions and circumstances set forth in the foregoing findings of fact are to the prejudice of the public and respondents' competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

(Seal)

C. W. Hunt,
Chairman.

Dated this 16th day of April, A. D., 1931.

Attest:

Otis B. Johnson,
Secretary.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D. 1931.

Commissioners:
C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of Nashville Roller Mills, a corporation, John Schultz, as President, Louis Baujan, as Vice-President, Vernon S. Tupper, as Secretary and Treasurer and each individually.	Docket No. 1599.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answer of respondents thereto, stipulation between counsel and briefs and arguments of counsel, and the Commission having made its findings as to the facts and it conclusion that respondents have been and are using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It Is Now Ordered that the respondents, Nashville Roller Mills, a corporation, John Schultz, President, Louis Baujan, Vice-President, Vernon S. Tupper, Secretary and Treasurer and each individually, their representatives, agents and employees and the representatives, agents and employees of each of them, do cease and desist from carrying on the business of selling flour in commerce among the several States of the United States under a trade name, corporate name or any other name which includes the word "Mills" or the words "Milling

Company" or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such word or words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such title or name, or by or through any such representations.

It Is Further Ordered, that the respondents above named within sixty (60) days from the notice hereof file with the Commission a report in writing setting forth in detail the manner in which the order has been complied with and conformed to.

Otis B. Johnson,
Secretary.

(Seal)

United States of America

BEFORE FEDERAL TRADE COMMISSION

In the Matter of Snell Milling Company, a corporation, Thomas E. Snell, as President and individually, J. A. Stevens, as Vice President and individually, and Percey Myatt, as Secretary and individually.	Docket No. 1600.

COMPLAINT.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes, the Federal Trade Commission charges that the Snell Milling Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondent, Snell Milling Company, is a corporation organized in 1925, and doing business, under the laws of the State of Tennessee. Its office and principal place of business are located in Nashville, Tennessee. The respondents, Thomas E. Snell, J. A. Stevens and Percy Myatt, are the President, Vice President and Secretary, respectively, of said corporation.

Paragraph Two: The Snell Milling Company is, and has been for two years last past, practicing the acts and things described in the following: It is engaged in purchasing wheat flour from flour millers throughout the middle west, which it causes to be transported to its plant in Nashville, where it is blended and mixed with certain chemical leavening agents, such as baking powder, used to produce the commodity known to the public and in the trade as "self-rising flour." Respondent solicits orders for the blends or mixtures so produced, from dealers in States other than Tennessee and contracts to sell and deliver, and does sell and cause them to be transported to purchasers outside the State of Tennessee. The

respondent Snell Milling Company is in competition with individuals, partnerships and corporations likewise engaged in the business of selling self-rising flour in interstate commerce.

Paragraph Three: Respondent Snell Milling Company, in carrying on its business as aforesaid, solicits orders and sells its product principally through the mail service. It is its practice to mail to lists of prospective customers at intervals letters containing quotations of prices and solicitations of orders. The letter head used by respondent in carrying on its business as the Snell Milling Company bears the following caption:

"SNELL MILLING COMPANY.
Manufacturers of
High Grade Flour
Every Sack Guaranteed"

Respondent in its business correspondence makes other representations which have the capacity and tend to lead dealers and prospective customers to believe that it operated a mill and grinds and manufactures the flour used and sold in it products.

Paragraph Four: Respondent Snell Milling Company also solicits orders for and sells its products under the trade name of "Peabody Mill Company," using principally the mail service. The letterhead used by respondent in carrying on its business under the name of Peabody Mill Company bears the caption:

"PEABODY MILL COMPANY
Manufacturers of Quality Flour."

In conducting its business under the name of "Peabody Mill Company," respondent in its business correspondence makes other representations which have the capacity and tend to lead dealers and prospective customers to believe that it operates a mill and grinds and manufactures the flour used and sold in its products under that name; whereas, in fact, "Peabody Mill Company" is a fiction and merely a trade name.

Paragraph Five: In the course of its business as aforesaid, respondent Snell Milling Company delivers the various blends of self-rising flours produced by it to purchasers in sacks on which are displayed the names and designs, or brands, adopted by it for the different blends, and the words "Snell Milling Company" or "Peabody Mill Company."

Complaint

Paragraph Six: Respondent Snell Milling Company owns no mill or machinery other than certain devices for mixing flour, purchased by it from various millers, with the ingredients indicated for self-rising flour as above described. It grinds no wheat or other cereal and owns and operates no machinery fitter for that purpose.

Paragraph Seven: The use by respondent Snell Milling Company of its corporate name and the trade name "Peabody Mill Company" in its business, and representations in its business correspondence as aforesaid, have the capacity and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing its products they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman or any element of cost of a middleman's profits, and to induce purchases of its flour by dealers and prospective purchasers on that understanding and belief; and said practices constitute unfair methods of competition with millers and manufacturers of flour likewise engaged in interstate commerce who grind the flour they offer for sale, alone or mixed as self-rising flour, and with producers and sellers of self-rising flour, likewise engaged in interstate commerce, who do not grind and manufacture, but buy and sell flour made by others, in their product, and do not represent themselves to be millers or manufacturers of flour; to the injury of said millers and producers of self-rising flour, in that said practices of respondent tend to take away their business by false representations.

Wherefore, said acts and practices of respondents are all to the prejudice of the public and constitute unfair methods of competition in commerce with the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission on this 20th day of April, A. D., 1929, now here issues that its complaint against respondents.

NOTICE.

Notice is hereby given you, Snell Milling Company, Thomas E. Snell, J. A. Stevens and Percey Myatt, respondents herein, that the 4th day of June, A. D., 1929, at 10:30 o'clock in the forenoon, is hereby fixed as the time, and the office of the Federal Trade Company, in the City of Washington, D. C., as the place, when and

where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required within thirty (30) days from service of the complaint, unless such time be extended by order of the Commission, to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answers and failure to answer (Rule III) provide as follows:

(1) In case respondent shall desire to contest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceedings, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

Complaint

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 20th day of April, A. D., 1929.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

THE JOINT AND SEPARATE ANSWER OF SNELL MILLING COMPANY, A CORPORATION, THOMAS E. SNELL, AS PRESIDENT THEREOF AND INDIVIDUALLY, J. A. STEVENS, AS VICE-PRESIDENT AND INDIVIDUALLY, AND PERCEY MYATT, ERRONEOUSLY SUED AS SECRETARY AND INDIVIDUALLY, TO THE COMPLAINT IN THIS CAUSE FILED AGAINST THEM—Filed May 20, 1929.

Respondents for answer say:

Answering Paragraph One:

Respondents admit that respondent Snell Milling Company is a corporation, organized in 1925, and doing business under the laws of Tennessee, with its office and principal place of business in Nashville, Tennessee; that the respondents Thomas E. Snell and J. A. Stevens are respectively President and Vice President thereof; but respondents deny that the said Percey Myatt is Secretary and Treasurer of said corporation, and aver on the contrary that he has no connection, official or otherwise, with said corporation, and is now engaged in another business, and that he was erroneously joined as a party to this proceeding.

Answering Paragraph Two:

1. It is admitted that the respondent Snell Milling Company is engaged in the production of self-rising flour in the City of Nashville, Tennessee, but it is denied that the duration and nature of said business are correctly stated in the complaint, the facts being that said corporation has been engaged in said business since its organization in 1925, and that the making of self-rising flour is not a mere mixing operation, but is on the contrary both a milling and a manufacturing operation, whereby, through the use of milling machinery, raw flour and other ingredients are manufactured into a separate and distinct product.

2. It is admitted that respondent corporation solicits orders, for the product so manufactured, from dealers in States other than Tennessee, and sells and causes the same to be transported to purchasers outside the State of Tennessee.

3. It is admitted that respondent corporation has competition from others in the sale of self-rising flour, but respondents are without knowledge as to whether these competitors are individuals, partnerships, or corporations, or as to what extent, if any, they are engaged in interstate commerce.

4. Respondents deny that those of said competitors who are so-called "millers" grind all the self-rising flour which they sell in competition with respondents, and on the contrary aver that said "millers", to a greater or less extent, buy flour which they make into self-rising flour by the same process used by respondents, and put out this product in their own bags and under their own brands, and respondents insist that "unfair competition" cannot be claimed for their protection, as hereinafter shown.

Answering Paragraph Three:

1. It is denied that respondent Snell Milling Company solicits orders and sells its product principally through the mail service.

2. It is admitted that said respondent, from time to time, mails letters to prospective customers containing quotations of prices and solicitation of orders.

3. Respondents admit that the letter head used by said corporation bears the caption stated in the complaint, and respondents insist that said corporation is both engaged in milling and manufacturing, and that

said letter head properly and truthfully describes its business.

4. Respondents deny the conclusion (no facts being stated in the complaint) that said corporation, in its business correspondence, makes other representations which have the capacity and tend to lead dealers and prospective customers to believe that it operates a mill and grinds and manufactures the flour used and sold in its products.

Answering Paragraph Four:

1. It is admitted that respondent Snell Milling Company also solicits orders and sells its product under the trade name "Peabody Mill Company," but it is denied that this is done principally by mail service. It is admitted that respondent, in carrying on its business under the trade name "Peabody Mill Company," uses the letter head containing the words "Mills" and "Manufacturers" mentioned in the complaint, and respondents insist that the use of these words is justified by the nature of the business.

2. It is admitted that the name "Peabody Mill Company" is a trade name, but it is denied that the use of said name has the capacity and tends to lead dealers and prospective customers to believe that it operates a mill which grinds and manufactures the flour used; and the conclusion (no facts being stated in the complaint) is likewise denied that respondent, in its business correspondence makes other representations which have the like tendency and effect.

3. In this connection respondents aver that the respondent Snell Milling Company also does business under the trade name "Mero Mills," having acquired the bags, stock of flour, good will, brands, and trade names of said "Mero Mills" on the ——— day of July, 1928. Respondents state, on information and belief, that on the ——— day of March, 1929, after said "Mero Mills" had ceased to do any business for mony months, and was in process of liquidation, the Treasurer, or former Treasurer of said company, without respondents' knowledge or consent, undertook to enter into a stipulation with the complainant Federal Trade Commission to cease and desist from the use of the word "Mills," etc.

Respondents have since been furnished with a copy of a letter, purporting to have been written to complainant Federal Trade Commission, under date of March 12, 1929, referring to File No. 1-4664, in which it is stated

that said company was liquidated in July, 1928, with the exception of real estate and accounts receivable; that the bags, stock of flour, good will, brands, and trade names were sold to respondent corporation; that the charter would be surrendered in the near future; that the "Mero Mills" had not sold or purchased flour since the date above stated, and that the only business being transacted by the corporation was the collection of accounts receivable, and looking after real estate.

Respondents are advised and submit that the signing of such stipulation (if valid for any purpose, in view of the facts hereinbefore set out), could not bind or affect the rights of these respondents.

Answering Paragraph Five:

It is true that in the course of its business respondent Snell Milling Company delivers the various blends of self-rising flour produced by it to purchasers in sacks, showing the names and designs for the different blends, and the words "Snell Milling Company" or "Peabody Mill Company," which respondents aver was done without intent to deceive, and without any tendency to deceive or in any way mislead the customers of respondent corporation.

Answering Paragraph Six:

Respondents deny that said corporation owns no machinery other than mixing devices, and aver on the contrary that it owns machinery adapted to the manufacture of self-rising flour by a milling process; that its capital stock is $50,000.00, and that its machinery and equipment is worth $10,000.00 to $12,000.00.

Answering Paragraph Seven:

1. Respondents deny that the use of the corporate name "Snell Milling Company" and of the trade names "Peabody Mill Company" and "Mero Mills," and the alleged representations in their business correspondence (no facts being stated in the complaint), have the capacity and tend to lead dealers and prospective purchasers of their products to believe that in so purchasing they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman, or any element of cost of a middleman's profits, and to induce purchases of their flour by dealers and prospective purchasers on that understanding and belief, as alleged in the complaint.

2. Respondents aver that the wheat "miller" does

not, and cannot, make self-rising flour by the use of his grinding machinery, but is compelled to first get his raw flour, either by grinding or purchase, and then by a separate milling process, and by separate machinery, (practically the same as that used by these respondents) turn it into self-rising flour. The "miller" who grinds his own flour has no advantage thereby, for he must absorb the local crop of wheat which may or may not be good, whereas, the so-called "blender" can buy the best flour wherever it is produced, and can buy such flour at actual cost. The explanation of this is that by selling their surplus at actual cost the wheat-grinding millers from whom he purchases are enabled to keep their mills going night and day, thus greatly reducing cost.

3. Respondents aver that there is no "middleman's profit" involved unless the self-rising flour which has been manufactured, as aforesaid, in the same way by both "miller" and "blender" is sold through a jobber; and where this is not done, and where the sale is made direct to the retailer, middleman's profits on self-rising flour are in fact eliminated.

4. Respondents further aver that the so-called "miller" has no advantage as to cost of manufacture, for it costs him as much, or practically as much, to manufacture his raw flour as it does for respondents to buy their raw flour, which they obtain very cheaply, for the reason hereinbefore stated. The production of self-rising flour is, as aforesaid, a separate milling process, as to which the so-called "miller" has no advantage, but is rather at a disadvantage.

5. Respondents further deny that said practices constitute unfair methods of competition with millers and manufacturers of flour alleged to be engaged in interstate commerce, who grind the flour they offer for sale alone, or mixed as self-rising flour, and with producers of self-rising flour alleged to be engaged in interstate commerce who do not represent themselves to be millers or manufacturers of flour, as alleged in the complaint.

Respondents further deny that they are in competition with any sellers of raw or plain flour, and deny that they claim to be manufacturers of plain flour, and deny that their customers or prospective customers believe them to be engaged in the manufacture and sale of plain flour.

6. Respondents deny that they have made any false representations to the injury of said "millers" and producers of self-rising flour, and that they have taken away their business by false representations, as alleged in the complaint.

7. Respondents deny that said acts and practices, alleged to have been committed by respondents, are all to the prejudice of the public, and constitute unfair methods of competition within the meaning of the Federal Trade Commission Act, and aver on the contrary that this proceeding, which is in fact (although not intentionally) in the interest of a few private individuals, is to the injury of the public and not within the spirit or letter of the Act.

Answering The Whole Complaint, respondents, in addition to the defenses hereinbefore set out, for further defense say:

1. Respondents deny that the complainant, the Federal Trade Commission, has jurisdiction of this proceeding.

2. Respondents deny that this proceeding falls within, or is covered by the said Act of Congress creating the Federal Trade Commission.

3. Respondents deny that this is a proceeding in the interest of the public, and insist that the practices described in the complaint do not substantially tend to affect the public to its injury.

4. Respondents insist that this proceeding, so far from being in the interest of the consuming public, is in fact (although not intentionally) in the interest of a few private individuals, competitors of respondents; that the effect of sustaining this proceeding will be to injure respondents and make their competition less effective, in that they will be charged by said competitors with fraudulent and willfully unfair practices; and that the effect of so reducing the competitive power of respondents will be to ultimately raise the price to the consuming public to its injury.

5. Respondents further state that the use by them of the word "Milling" and of the word "Manufacturers" has been and is in good faith, and under claim of lawful right; that no fraud or deceit of any kind has been practiced on the public (none being charged in the complaint); that there has been no substitution by respondents of an inferior for a superior article, to the injury and deception of the consuming public); that the wheat "miller" does not manufacture self-rising flour by the use of his grinding mill, but by the same process as that used by respondents manufacturers the same self-rising flour, which is no wise superior to the product of respondents, but which is more apt to be inferior.

6. Respondents are without knowledge of any pro-

ducers of self-rising flour (so-called "blenders") who claim to have been injured in competing with respondents by the use of the words "Milling" or "Manufacturer," and deny that any persons claiming to be so injured are their competitors, but allege on the contrary that the competitors who are objecting to the use of said words by respondents are individuals, firms, or corporations owning wheat grinding mills, but also engaged in the manufacture and sale of self-rising flour in competition with respondents.

With respect to such competitors, respondents insist that they follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors, who are themselves engaged in the same practices condemned by the complaint.

7. Respondents aver that their sales are made to customers who are familiar with their methods, and that none of their customers are in fact deceived or misled into thinking that they operate a wheat-grinding mill; and respondents aver that it would not be to their advantage if they did think so, because better self-rising flour can be made by so-called "blenders." The "miller" is to a large extent dependent on the local crop, but respondents can buy wherever the crop is best.

8. Respondents deny that they have represented, or led their customers or the public to believe, that middleman's profits are excluded, etc., as alleged in the complaint. This charge is a mere unwarranted inference, or conclusion, without facts alleged to support it.

9. Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, in October, 1916, handed down an opinion, which remains of record, denying the contentions of the so-

called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors.

10. Respondents for further defense submit that the complainant Federal Trade Commission, after ex parte investigation, has prejudiced this case on questions of fact which are of vital, if not controlling importance, in that its authorized agent, acting in its behalf, has in writing stated that said Commission was of the opinion that respondents are not engaged in a manufacturing or milling process.

Respondents do not charge any bad faith, or intentional unfairness, on the part of the Commission, but submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law, in this proceeding.

And respondents further submit that if the Federal Trade Commission Act is to be construed as authorizing such procedure, such portion of said Act contravenes the Fifth Amendment to the Constitution of the United States, in that the Federal Trade Commission is not only undertaking to act at the same time as litigant and judge —which is contrary to the fundamental maxim that no man shall be a judge in his own case—but its findings of fact, although erroneous and contrary to the weight of the evidence, are conclusive if supported by any material evidence, and for this reason a full review of its action by an impartial tribunal is denied, and litigants are thereby deprived of their property without due process of law.

11. Respondents further aver that they have no wish, and have never had any wish or intention, to use unfair methods in competition, and have never used the words "Milling" or "Manufacturer" or any other words mentioned in the complaint, with any intent to deceive or make false representations of any kind, being advised on the contrary that said words are truthful and fully authorized under the facts hereinbefore set out; and respondents submit that they should not be required to give up the trade names under which a valuable good will has been acquired; that this would inflict an unnecessary

loss and hardship on respondents, and would in no wise benefit the public.

12. Respondents further state that they and other Nashville manufacturers of self-rising and processed flour supply a trade which is accustomed to buy in small quantities, and such service is an economic necessity in said territory, and is in the interest of dealers and of the consuming public, and enables consumers to obtain these products at a lower price than would be possible if such service were withdrawn or discontinued.

Respondents further aver that all self-rising and processed flour is of the same general type, whether manufactured by the so-called "millers" or the so-called "blenders," and that competition between them can only be determined, and is in fact determined, by three factors, to-wit, price, quality, and service. The grinding of flour in a particular mill is not, and cannot be, a factor.

Wherefore, respondents having fully answered, pray that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville Trust
Building,
Nashville, Tennessee.

AMENDED COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that the Snell Milling Company, a corporation, and Thomas E. Snell as President and individually, J. A. Stevens as Vice President and individually and Percey Myatt as

Secretary and individually, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: Respondent, Snell Milling Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal place of business in the City of Nashville, State of Tennessee. The respondents, Thomas E. Snell, J. A. Stevens and Percey Myatt are the President, Vice President and Secretary, respectively, of said corporation, and direct and control and manage its business.

Paragraph Two: Respondent, Snell Milling Company, is engaged in the business of purchasing various lots and grades of wheat flour from mills located in the middle west which it causes to be transported to its principal place of business in the City of Nashville and there blending and mixing the flours so purchased by it and putting up in sacks and offering for sale and selling the mixtures and blends resulting therefrom, in some cases adding leavening agents such as baking powder to the blends or mixtures producing the commodity known to the public and in the trade as "Self-rising flour." In the course and conduct of its business as aforesaid said respondent solicits orders for its products from dealer in various states other than Tennessee, and contracts to sell and deliver and does sell and cause to be transported to purchasers outside the State of Tennessee its products as above described. Said respondent is in competition with individuals, partnerships and corporations likewise engaged in the business of selling wheat flour, either in plain or self-rising form, in interstate commerce who either manufacture the flour they sell by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour; or purchase the flour they offer for sale, whether as plain or self-rising, and do not in their trade names or otherwise in the conduct of their business use the term "mill," or "mills," or "miller," or "milling" or otherwise represent that they are engaged in the manufacture of flour as above described. Respondent in carrying on its business as aforesaid solicits orders and sells its product largely to retail grocers through the mail service.

Paragraph Three: Respondent, Snell Milling Company, in the course and conduct of its business as afore-

said solicits orders and sells its products under the name of "Snell Milling Company" and uses upon its letterheads and other business correspondence such terms and representations as:

"SNELL MILLING COMPANY
Manufacturers of
High Grade Flour
Every Sack Guaranteed"

Respondent in its business correspondence and literature makes other representations which have the capacity and tendency to lead dealers and prospective customers to believe that it operates a mill and manufactures as above described, the flour sold by it.

Paragraph Four: Respondent, Snell Milling Company, also solicits orders for and sells its products under the trade name "Peabody Mill Company." The letterheads and business correspondence and other literature of respondent used by it in carrying on its business under the name of Peabody Mill Company bears the caption:

"PEABODY MILL COMPANY
Manufacturers of Quality Flour."

In the conduct of its business under the name of Peabody Mill Company respondent makes other representations which have the capacity and tendency to lead dealers and prospective customers to believe that it operates a mill and manufactures, as above described, the flour sold by it; whereas in truth and in fact "Peabody Mill Company" is merely a trade name.

Paragraph Five: In the course and conduct of its business as aforesaid respondent, Snell Milling Company, delivers the various blends of flour sold by it to purchasers in sacks on which are displayed the names and designs, or brands, adopted by it for its blends and the words "Snell Milling Company" or "Peabody Mill Company."

Paragraph Six: Respondent, Snell Milling Company, owns and operates no mill or machinery other than certain devices for blending or mixing lots and grades of flour purchased from millers as above described and in some cases adding leavening agents. It manufactures no flour by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour and owns or operates no mill or machinery fitted for that purpose.

Amended Complaint

Paragraph Seven: The use by respondent, Snell Milling Company, of its corporate name and the trade name "Peabody Mill Company" in its business and the representations in its business correspondence and otherwise as aforesaid have the capacity and tendency to lead dealers and prospective purchasers of plain and self-rising flour to believe that in purchasing its products they are buying direct from a miller or manufacturer of flour as above described without the intervention of a middleman or any element of cost of a middleman's profit, and induce purchases of its flour by dealers and consumers on that understanding and belief; and said representations constitute unfair methods of competition with millers or manufacturers of flour likewise engaged in interstate commerce who make, as above described, the flour they offer for sale and with sellers of flour likewise engaged in interstate commerce who do not so manufacture but buy and sell flour made by others and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and sellers of flour in that said representations of respondent are false and misleading and tend to take away their business.

Wherefore, said acts and practices of respondent are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission on this 4th day of September, A. D., 1929, now here issues this its amended complaint against respondents.

NOTICE.

Notice is hereby given you, Snell Milling Company, and Thomas E. Snell, J. A. Stevens, and Percey Myatt, respondents herein, that the 4th day of October, A. D. 1929, at 2 o'clock in the afternoon is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

Amended Complaint

You are notified and required on or before said date, to file with the Commission an answer to the complaint. If answer is filed appearance on that date will not be required and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

(1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the complaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegations of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter, and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to appear to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, The Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 4th day of September, A. D. 1929.

By the Commission:

(Seal) Otis B. Johnson,
Secretary.

ANSWER TO AMENDED COMPLAINT—Filed Oct. 3, 1929.

The Joint and Separate Answer of Snell Milling Company, a corporation, Thomas E. Snell, as President and individually, J. A. Stevens, as Vice President and individually, and Percey Myatt, erroneously sued as Secretary and individually, to the Amended Complaint in this cause filed against them.

Respondents for answer say:

1. It is admitted that respondent Snell Milling Company is a corporation, organized in 1925, and doing business under the laws of Tennessee, with its office and principal place of business in Nashville, Tennessee; that the respondents Thomas E. Snell and J. A. Stevens are respectively President and Vice President thereof; but respondents deny that the said Percey Myatt is Secretary and Treasurer of said corporation, and aver on the contrary that he has no connection, officially, or otherwise, with said corporation, and is now engaged in another business, and that he was erroneously joined as party to this proceeding.

It is admitted that said corporation is engaged in the manufacture of self-rising or processed flour in the City of Nashville Tennessee but it is denied that said business and the process of manufacturing said products are correctly described in the complaint.

2. It is admitted that respondent corporation contracts to sell, and sells and delivers its products outside the State of Tennessee.

3. Respondents admit that said corporation is in competition with others, in making and distributing said products but are without knowledge as to whether said competitors are individuals, partnerships, or corporations, or as to whether they are engaged in Interstate Commerce, or as to whether they manufacture the flour sold by grinding or crushing wheat, or as to whether they purchase the flour which they offer for sale, and do not, in their trade names, or otherwise, use the term "Mill," "Miller," or "Milling," or otherwise represent that they are engaged in the manufacture of flour, etc., as alleged in the complaint.

4. It is denied that respondent corporation solicits orders and sells its products largely to retail grocers through the mail service.

5. Respondents deny that those of their competitors who are so-called millers grind all the self-rising flour

which they sell in competition with respondent corporation, and on the contrary aver that they, to a greater or less extent, buy flour from others, which they make into self-rising flour by the same method used by respondents, and put out this product in their own bags and under their own brands; and respondents aver that the same is true with respect to "processed" flour.

6. Respondents admit that in the conduct of their business, as aforesaid, said corporation solicits orders, and sell its products, not only under the corporate name of Snell Milling Company, but under the trade name of "Peabody Mill Company," and also under the trade name of "Mero Mills," having acquired the bags, stock of flour, good will, brands and trade name of said "Mero Mills" on the ———— day of July, 1928.

Respondents state, on information and belief, that on the ———— day of March, 1929, after said "Mero Mills" had ceased to do any business for many months, and was in process of liquidation, the Treasurer, or former Treasurer, of said company, without respondents' knowledge or consent, undertook to enter into a stipulation with the Complainant Federal Trade Commission, to cease and desist from the use of the word "Mills," etc. Respondents have since been furnished with a copy of a letter, purporting to have been written to Complainant Federal Trade Commission, under date of March 12, 1929, referred to file No. 1-4664, in which it is stated that said company was liquidated in July, 1928, with the exception of real estate and accounts receivable; that the bags, stock of flour, good will, brands and trade name was sold to respondent corporation; that the charter would be surrendered in the near future; that the "Mero Mills" had not sold or purchased flour since the date above stated; and that the only business being transacted by the corporation was the collection of accounts receivable and looking after real estate.

Respondents are advised and submit that the signing of such stipulation (if valid for any purpose, in view of the facts hereinbefore set out) could not bind or affect the rights of these respondents.

7. Respondents deny that the letter-heads, bags, and advertising matter, and the statements therein appearing, are correctly described in the complaint.

8. Respondents admit that the words "Mill," "Milling," and "Manufacturer" are used in connection with the letter-heads, advertising matter, and bags, in the conduct of the business.

Answer to Amended Complaint

9. Respondents deny that in the conduct of their business, under the name of "Peabody Mill Company," any representations are made which have the capacity and tendency to lead dealers and prospective customers to believe that respondent corporation is operating a wheat-grinding mill.

10. Respondents deny that said corporation owns or operates no mill or machinery other than certain mixing devices, etc., and aver that they own machinery adapted to the manufacture of self-rising and processed flour, which is both a milling and manufacturing operation, the value of respondents' plant being approximately $..... ....., of the machinery and equipment, approximately $....., and of the investment, capital, etc., approximately $.....; or a total investment of approximately $..... Respondents' plant has a capacity of about ..... barrels a day on a twenty-four-hour basis. In 1928 respondents did a business of approximately $.....

It is true that respondent corporation grinds no wheat, or other cereals, and owns no wheat-grinding machinery.

11. Respondents deny that the use of the aforesaid trade names with the word "Mills" or "Milling," separately or in combination with the term "Manufacturer," or any other statements on respondent corporation's letter-heads, bags, etc., has any tendency to make dealers or prospective customers or consumers believe that they are buying flour from a miller and manufacturer without a middleman's profits, etc., as claimed in the complaint.

12. Respondents deny that any false representations are thereby made, and deny that these alleged practices, if proven, constitute any unfair competition with millers and makers of self-rising flour, or processed flour, alleged to be likewise engaged in Interstate Commerce, etc.

13. Respondents deny that said alleged actions have the effect of taking away business improperly from said alleged competitors, and on the contrary aver that said conduct, if proven, could have no such possible effect:

(a) Because the so-called "Millers" do not and cannot make self-rising flour with their grinding mills, but must first obtain raw flour, either by grinding it, or by purchasing the same, and then turn it into self-rising flour.

(b) Because said "Millers" obtain no advantage from making self-rising flour from the flour which they grind, but are rather at a disadvantage, both as to cost of pro-

duction of the raw flour, and as to its quality, as will be shown at the hearing.

(c) Because self-rising and processed flour, no matter by whom made or sold, is essentially the same product destined for consumption in a particular region, and the buyers of such flour are governed by three factors, to-wit: price, quality, and service.

(d) Because there is no pretense in the complaint that self-rising or processed flour made by the so-called "miller" is any better than that manufactured by the so-called "blender," and there is no deception of the public by substituting an inferior for a superior article.

14. Respondents aver that those of their competitors who are "Millers" follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors who are themselves engaged, as against respondents, in the same practices condemned by the complaint.

15. Respondents deny, as hereinbefore set out, that the use of the words "Mills," "Milling," or "Manufacturer," misleads, or has a tendency to mislead, any substantial portion of the purchasing or consuming public, in that they may be led to believe they are buying from one who grinds his wheat. But respondents are willing to cut off the possibility of deceiving, or misleading, any purchaser or customer through the use of the words above quoted, and to this end have heretofore offered, and hereby offer, to place on their letter-heads, bags, invoices, etc., in conspicuous lettering the words:

"NOT GRINDERS OF WHEAT"

Respondents believe and state that they are "millers" and "manufacturers" in that they turn out a distinct product by the use of milling machinery—but they are not, and do not claim to be, grinders of wheat, and are willing that this be distinctly and unequivocally stated.

16. Respondents, under the trade names aforesaid, have acquired a valuable good will, and they insist that it would be unjust and inequitable to deprive them of this.

Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills and manufactur-

ing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, in October, 1916, handed down an opinion, which remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors, thereby depriving respondents of the valuable good will which they have built up.

17. Respondents deny that this proceeding is in the interest of the public, as claimed in the complaint, and allege on the contrary that said proceeding is actually (though not intentionally) in the interest of a few private individuals, competitors of the so-called "blenders," and that its tendency and effect, if sustained, will be to injure and exploit the consuming public for the benefit of private individuals. Respondents insist that the practices described in the complaint do not substantially tend to effect the public to its injury; deny that this proceeding falls within or is covered by the Act of Congress creating the Federal Trade Commission; and deny that the Complainant, Federal Trade Commission, has jurisdiction of this proceeding.

18. Respondents submit that Section 5 of the Federal Trade Commission Act, and the procedure thereunder, violate the Fifth Amendment to the Constitution of the United States, in that said Federal Trade Commission is not and cannot be impartial, since it acts both as plaintiff and judge in the same proceeding, and because its findings, however erroneous, and however opposed to the weight of evidence, are binding and conclusive on review if supported by any material evidence, and thus a full review by an impartial tribunal is denied, and the litigants before said Commission are thereby deprived of due process of law.

Respondents further submit that the Complainant, Federal Trade Commission, after ex parte investigation,

has prejudged this case on questions of fact, which are of vital, if not controlling importance.

Respondents do not charge any bad faith, or intentional unfairness; on the part of the Commission, but submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law in this proceeding.

And now having fully answered, respondents pray that said Complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville
Trust Bldg.,
Nashville, Tennessee.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 19th day of October, A. D. 1929.

Commissioners:
Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matters of	
Royal Milling Co., et al,	Docket No. 1597
Tennessee Grain Co.,	Docket No. 1598
Nashville Roller Mills,	Docket No. 1599
Snell Milling Co.,	Docket No. 1600
Watauga Milling Co., et al.,	Docket No. 1601
State Milling Co., et al.,	Docket No. 1602
Cherokee Mills Co., et al.	Docket No. 1604

ORDER.

The above-entitled matters coming on for consideration by the Commission on the suggested solutions of the issues raised in the complaints filed July 12, 1929, by Thomas H. Malone, counsel for respondents, and the Commission now being fully advised in the premises,

It Is Ordered that said suggested solutions be considered at the time of final argument on the merits.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

STIPULATION OF COUNSEL.

In the above styled cause it is stipulated and agreed between Baldwin B. Bane, Esq., counsel for Federal Trade Commission, and Thomas H. Malone, counsel for respondents, and subject to the approval of the Federal Trade Commission:

I. That all evidence taken in the case of Francis J. McCarthy, doing business under the names of Watauga Milling Company, etc. (Docket No. 1601), may be considered as part of the evidence herein.

II. That the matters hereinafter covered by further stipulation in this cause may be considered in said cause of Francis J. McCarthy, doing business, etc. (Docket No. 1601), so far as they may be material to the general issues raised by the pleadings.

III. That in addition to the evidence in said cause (Docket No. 1601), the following additional facts are stipulated with reference to this cause:

1. That Snell Milling Company was organized in 1925, as a corporation under the laws of Tennessee, with its office and plant at Nashville, Tennessee. That Thomas E. Snell is President and J. A. Stevens is Vice-President thereof. That Percey Myatt has no connection, official or otherwise, with said Company, and was not connected with it at the time the complaint was filed herein.

2. That said corporation is engaged in business at Nashville, Tennessee, in making "self-rising" flour, and also what is described in the testimony of respondent Francis J. McCarthy (in Docket 1601) as "processed" flour—said operations being conducted along the same lines and by machinery of the same type as that employed and used by the said respondent Francis J. McCarthy.

3. That said corporation also operates under the trade names "Peabody Mill Company" and "Mero Mills," having acquired the bags, stock of flour, good will, brands, and trade name of said "Mero Mills" in July, 1928. This is the same "Mero Mills" mentioned in the testimony of the witness Thomas E. Snell in said cause in Docket No. 1601, at pages 934, et seq., of the record.

4. That the brands put out by the respondent corporation under its own name are as follows:

"Queen of the South"—"Plain."
"Ever White"—"Plain."
"Early Dawn"—"Plain."

"Rose Lawn"—"Plain."
"Evening Star"—"Plain."
"The Keystone"—"Plain."
"K O"—"Plain."
"The Keystone"—"Self-rising."
"Play Mates"—"Self-rising."
"Fortune"—"Self-rising."
"Sky Rocket"—"Self-rising."
"Daddy Ganda"—"Self-rising."
"K O"—"Self-rising."

5. That the brands put out under the name of "Peabody Mill Company" are as follows:

"Melba—"Plain."
"Bungalow"—"Plain."
"Sailor Cap"—"Plain."
"Silver Wave"—"Patent Self-rising."
"Red Hat"—"Self-rising."
"Complete"—"Self-rising."
"Echo"—"Self-rising."

6. That the brands put out under the name "Mero Mills" are as follows:

"Polka Dot"—"Plain and Self-rising."
"Light Wings"—"Plain and Self-rising."
"Fine Line"—"Plain and Self-rising."
"Queens Taste"—"Plain and Self-rising."
"Queen of Wheat"—"Plain and Self-rising."
"Queen of Hearts"—"Plain and Self-rising."
"Sixty-one"—"Plain and Self-rising."
"Bound to Rise"—"Self-rising."

7. That said corporation, in carrying on its business, buys and sells in Interstate Commerce.

8. That of the flour which goes through the processes already described, in said plant, and is afterwards sold to the trade, approximately 85% is "self-rising,' and approximately 15% is "processed."

9. That said corporation, in 1929, did a business which in barrels amounted to approximately 77,880, and in dollars and cents to approximately $557,185.80.

10. That exhibits 1 to 9 inclusive show letters written by said corporation, and sent out to customers, or prospective customers, under the dates shown by the respective exhibits.

Stipulation of Counsel

11. That exhibits 10 to 23 inclusive show the bags, sacks, brands, etc., used by respondent corporation in carrying on its business.

12. That said corporation markets its products chiefly to the retail trade by direct solicitation through the mail.

13. That under date of March 1, 1929, a letter was addressed to Messrs. Bailey & Davies, then acting as counsel for Snell Milling Company, signed by Web Woodfill, Chief Trial Examiner of Federal Trade Commission, which is made exhibit 24 hereto. That a copy of the stipulation, to which reference is made in said letter, is filed as exhibit 25 hereto. These exhibits are subject to the same objections, ruling of the Examiner, and exceptions made with reference to the offer of similar exhibits in Docket 1601, R., p. 1066, et seq., respondents' exhibits for identification 71 and 72.

14. That under date of July 12, 1929, a proposed solution of the controversy between respondent corporation and the Federal Trade Commission was offered—the nature of said proposed solution, and the action of the Commission with respect thereto, being set out in the testimony of the witness Vernon S. Tupper, at pages 1070, et seq., of the record in Docket No. 1601.

IV. That the Federal Trade Commission wrote this respondent corporation, and also the respondents in Docket 1597 (Royal Milling Company), Docket 1598 (Tennessee Grain Co. and Tennessee Milling Co.), Docket 1599 (Nashville Roller Mills), Docket 1601 (Watauga Milling Co.), Docket 1602 (State Milling Co.), Docket 1604 (Cherokee Mills), Docket 1607 (Old Hickory Mills), Docket 1617 (Southern Milling Co.), and also Mero Mills, (which, it is stipulated, is the same Mero Mills mentioned in the testimony of the witness Thomas E. Snell in Docket 1601 at pages 934, et seq., of the record), a letter similar in form to respondents' exhibit 68, as shown in the testimony of the witness Vernon S. Tupper in Docket No. 1601, at page 1039 of the record, requesting from each a list of twenty-five customers; that nine of the above named concerns complied with said request; and that from the names so furnished the Federal Trade Commission obtained the twenty-five merchants or dealers, who were examined in chief on behalf of the Commission in said cause, Docket No. 1601, with the exception of the following two witnesses—Walter Cunningham and C. S. Ragland.

V. That to prevent the expense, delay and trouble incident to a separate trial of this cause, the same may

be heard and determined by the Commission in connection with said cause of Francis J. McCarthy, doing business, etc., Docket No. 1601,—it being agreed that the evidence introduced in said cause (Docket No. 1601) may be looked to by either party as if taken in this cause, and with respect to this respondent corporation, except in so far as changed by this stipulation, and that the record therein shall constitute part of this record.

Thomas H. Malone,
for Respondents.
Baldwin B. Bane.

United States of America

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioners:
C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the matter of Snell Milling Company, a corporation, Thomas E. Snell, as President and individually, J. A. Stevens, as Vice-President and individually, Percey Myatt, as Secretary and individually.	Docket No. 1600.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served an amended complaint upon the respondents above named charging them with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

The respondents having entered their appearances and having filed their answer herein, a stipulation as to the facts was entered into between counsel for the respondents and counsel for the Commission is which it was stipulated and agreed that the Federal Trade Commission should take such stipulation as to the facts in lieu of testimony.

Thereupon this proceeding came on for decision by the Commission on the briefs submitted by counsel for the Commission and counsel for the respondents, and argument by counsel for the Commission and counsel for the respondents, and the Commission having duly considered the record and being fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

Paragraph One: Respondent, Snell Milling Company, is a corporation organized and existing under the

Findings as to the Facts and Conclusion

laws of the State of Tennessee with its office and place of business in Nashville, Tennessee. Respondent corporation was organized in 1925. Thomas E. Snell is President and J. A. Stevens is Vice-President of respondent corporation. Respondents, Thomas E. Snell and J. A. Stevens, manage, control and direct the business of respondent, Snell Milling Company. Respondent Percey Myatt has no connection officially or otherwise with said respondent corporation and was not connected with it at the time the complaint herein was filed. Respondent corporation conducts business under its own name and also under the trade names Peabody Mill Company and Mero Mills. Respondent corporation is engaged in the business of buying flour from concerns that grind wheat into flour and then mixing such flours, in some instances adding phosphate, and in other instances adding salt, soda, and phosphate, which makes the flour ready for use without the addition of baking powder, and thus gives to it the name of self-rising flour. It then packs the flour in bags under the brands of its respective trade names, and sells it to dealers located in various states of the United States, but particularly in the Southeastern States. Respondent corporation buys the flour from concerns grinding wheat into flour and located at various points throughout the United States. This flour is shipped to it at Nashville, Tennessee from which point it ships the flour to its customers. In the course and conduct of its business respondent corporation is in competition with other corporations, partnerships, and individuals engaged in the sale of flour in interstate commerce.

Paragraph Two: Respondent corporation puts the flour which it buys from concerns located at various points throughout the United States in what is called a batch mixer, where it is stirred up and mixed together. Usually but not always two or more flours are so mixed or stirred up together. If the flour is to be self-rising there is added in this mixer the correct proportions of salt, soda, and phosphate. If it is not to be self-rising a little phosphate is added in the mixer. The flour is then run from this batch mixer into bins, from which it goes to a draver feeder which feeds the flour into elevator cups, which carry it to the real or sifter, from whence it goes after being sifted into hopper bins, and thence to the packer where it is packed into bags of the desired sizes. There is no grinding process in the operation. Respondent sells from 7 to 13 brands of flour under each name, but each brand does not represent a dif-

ferent quality or grade of flour. It takes from 10 to 15 minutes to run the flour through the equipment used by respondent corporation. The cost of the machinery in such a plant as the respondent corporation's, having a capacity of 3,000 barrels a day on a 24 hour run, is approximately $20,000 to $25,000, and the total investment approximately $150,000 to $200,000.

Paragraph Three: The grinding of wheat into flour has developed by various steps until today it has become a refined, complex, and scientific process. Roughly, the operations which constitute the process are: (1) cleaning and otherwise preparing the grain for grinding; (2) the grinding or reduction of the grain; (3) the bolting or sifting operation; (4) purification and preparation of the product by blowing air through it, adding phosphate, bleaching agents, etc. The modern method of grinding wheat substitutes for the single grinding between millstones a succession of grinding between several sets of iron or porcelain rollers. The wheat when received at the mill is unloaded into elevators or bins, and is thoroughly screened and dry cleaned and scoured by machines especially adapted for that purpose. This process itself is quite complicated, requiring a great deal of machinery. The wheat is analyzed and graded and then tempered and conditioned, preparatory to being ground. It is then passed through the rollers, each passage through a pair of rollers being called a break, and different concerns using different numbers of breaks. After each break the product is sifted or bolted, and the results of the siftings go into various streams, which are carried to other sets of rollers where they are again crushed or broken, the process being a continuous operation. A five break mill has eighteen spans of rolls and thirty-two separations. Each break effects a mechanical separation. The bolting or sifting separates the results of the breaks into various streams and products, such as flour, middlings, offals, bran, shorts, etc. The bolting or sifting machine is commonly referred to as a reel. After the flour has gone through the rolls it is again bolted or sifted, and then sent to the packing room. The flour is milled to definite standards in order to insure uniformity. The wheats for the various brands of flour made by the mill are selected by the chemist and the superintendent from reports which are on file in the superintendent's and chemist's offices, showing the characteristics and chemical constituents of the wheats. Concerns grinding wheat into flour are known as "Manufacturers of Flour." Bolting or sifting has been done by

the concerns grinding the wheat into flour in this country from the earliest times. The number of boltings or siftings differs in different mills, and is of importance in determining the appearance of the flour. Bolting or sifting is but a part of the process of preparing the flour. Concerns grinding wheat into flour bleach the flour, the bleaching agent being added on the mill stream. This bleaching matures or ages the flour, thus improving its baking qualities, and whitens it. Concerns grinding wheat into flour blend flours by a blending of the wheats after a chemical analysis of such wheats, and by blending the various streams of flour produced by the different breakings of the wheat berry between the various rolls in the mill. Concerns grinding wheat into flour maintain a laboratory and an experimental mill in charge of a chemist, in which the wheats and flours are analyzed and tested in order to determine their various characteristics, such as gluten content, protein content, moisture content, ash content, etc., in order to keep each of the brands of flour put out by such concerns uniform. It is only from chemical tests that such contents of the flour can be determined and the uniformity of each brand maintained. These characteristics determine the grade and quality of the flour. Unless these characteristics of the flour are maintained practically uniform in each brand of flour, the flour cannot be kept up to one standard. Concerns grinding wheat into flour are very jealous of their grades and brands, and guard and protect them with great care. All mills in the process of grinding the wheat and preparing the flour make or produce several grades of flour. These are, in the order of the best and highest priced grades: patent flour, which means that part of the stream of flour which is left after taking off a greater or less per cent of the inferior flour—it is the best flour made by the mill; straight flour, which means one hundred per cent flour, all the flour that is extracted from the wheat berry; clear flour is the flour taken off by the mill after the patent flour has been removed; low grade flour designates all of the lowest grades made by the particular mill. These terms indicate with different mills' flours of widely different qualities. The cost of the machinery for a concern grinding wheat into flour with a capacity of about 3,000 barrels a day is about $600,000, and the total investment between $1,000,000 and $1,500,000. The time required for preparing the wheat and producing the flour by such a concern is from eight hours to fifty or sixty hours, due to differences in time required for tempering the wheat.

But if the tempering time is excluded, the time required is from a half hour to one and a half hours, depending upon the number of breaks and boltings used by the concern.

Paragraph Four: Practically all concerns grinding wheat into flour add phosphate to the flour on the mill stream, that is, as the flour is run through the mill. This addition is for the purpose of whitening the baked product and counteracting an overdose of soda. Self-rising flour is flour to which there has been added in correct proportions salt, soda, and phosphate, so that the flour is ready for use without the addition of baking powder by the cook. It is particularly adapted to the making of biscuits. A formula for mixing self-rising flour was discovered by Professor Liebig about seventy-five years ago. The self-rising flour business was originated or begun in Nashville, Tennessee, by a Dr. Owsley. He operated under the name of Owsley Flour Company and sold through the Southeastern States. This company was succeeded by the Ford Flour Company about 1897, which concern is still in existence and selling self-rising and plain or phosphated flour throughout the South. The concerns originating the mixing of self-rising flour in Nashville and not grinding wheat into flour did not call themselves mills or milling companies, or manufacturers of flour. Most of those actually grinding wheat into flour and selling in the Southeastern States mix and sell self-rising flour, and such is usually produced directly from the mill stream—that is, by running the mill stream directly into the mixers where the self-rising ingredients are added before the flour is finally bolted and packed. Respondent corporation sells in competition with those actually grinding wheat into flour, and in competition with those engaged in the same character of business as respondent and who do not represent themselves as mills or milling companies, or manufacturers of flour.

Paragraph Five: Nashville, Tennessee, is the center of the flour industry in the South. There are several concerns located there grinding wheat into flour, and other concerns used to be located there that ground wheat into flour. There are approximately 170 concerns actually grinding wheat into flour and selling in the Southeastern territory.

Paragraph Six: Respondent corporation does not have or maintain a laboratory for testing or analyzing the flours which it buys or sells. It uses regularly only the so-called paddle test, which consists in simply putting the flour on a paddle and looking at it. By this test the

characteristics or qualities of the flours, such as gluten content, protein content, moisture content, starch content, etc., cannot be determined. Only the relative appearance of the two flours can be gotten from such a test, and this is of little value in approximating even the grade of the flour, because practically all concerns grinding wheat into flour add phosphate and a bleaching agent to the flour on the mill stream. Different concerns add different amounts of such, and a greater amount of bleaching makes a lower grade of flour appear better. Practically no two concerns grinding wheat into flour grind exactly alike. Some granulate the flour finer than others, and some add a larger proportion of the total break of the wheat berry to their various grades of flour than do others. A difference in the granulation of the flour and in the amount of the total break of the wheat berry contained in the flour affects very materially the appearance of the flour. The quality and characteristics of the flour cannot be determined by the paddle test, and respondent corporation by this test cannot maintain uniformity of brands or grades. The grade and quality of all flours are determined by their chemical analysis. The quality or grade of the flour is not changed by mixing self-rising ingredients with it and running it through the equipment in respondent corporation's plant. From time immemorial there have been plants buying and blending flour but not grinding wheat into flour, which plants were known as blending plants and not called or known as mills or milling companies, or manufacturers of flour. Such terms have from time immemorial been applied in the flour trade only to the grinding of the grain.

Paragraph Seven: Respondent corporation represents itself as "Snell Milling Company. Manufacturers of High Grade Flour"; "Peabody Mill Company. Manufacturers of Quality Flour"; "Mero Mills. Manufacturers of Quality Flours." In the letters, circulars and literature which respondent corporation circulates among the trade in its efforts to sell flour it makes such statements as the following:

> "When you look at the price below, and compare with prices of other mills, you will figure it is impossible for any mill to put out guaranteed flour at such an unheard of low price, and you lay this letter aside and not order. * * * You can always save yourself money by paying cash. This mill is simply

run on a cash proposition. That's the reason these prices are possible."

And:

"The volume of business that any mill does is one of the main factors that serve to hold the price down. This is the principle upon which this mill is built."

And:

"You understand we are able to give you this discount because we will sell to you direct and not through a wholesale jobber, for as you perhaps know 40c per barrel is considered the legitimate profit of the jobber, but when you buy flour direct from us we feel that we can give you the benefit of this jobber's profit."

And:

"There can be do doubt but what the above prices are much too cheap considering the present market and what it is costing us to make our brands of flour, and it is our suggestion to our customers that they mail us either an order or a booking immediately so as to be sure and get the benefit of these prices."

And:

"As you will note we make no difference in price for plain and self-rising flour of the same grade, although it is customary with a great many mills to charge 25c per barrel over the plain for self-rising of the same quality. We invite your comparison of these prices with other mills, and will be glad to have you call us over 'phone or wire us our expense if interested."

Paragraph Eight: The containers for respondent corporation's flour have on them the corporate or trade name under which it is selling the particular flour such as "Snell Milling Company," "Peabody Mill Company," "Mero Mills." In addition there appears upon the containers for the flour the brand name and a designation of the type of the flour such as "Queen of the South. Superb Patent Flour." "Early Dawn. Standard Patent Flour," "Fortune. Superb Self-Rising Flour," "Daddy Gander. Self-Rising Flour," "Melva. Highest Patent Flour," "Red Hat. Highest Patent Self-Rising Flour." There is no such term as "process flour" or "processed

flour" in the flour or milling industry. Such terms have no significance in the trade. Neither the word "process" nor the word "processed" appears anywhere on any of respondent corporation's bags, labels, or containers, or in any of its literature as descriptive of any of its flour. The term "process flour" or "processed flour" could only mean flour handled twice, run through the mixing machines and packed in sizes suitable for the family trade, or a low grade or off grade flour that has been mixed with good flour to bring the grade up to a suitable standard.

Paragraph Nine: When the term "mills" or "milling company" or "manufacturer of flour" is used in the flour industry it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour. When either of such is used in the name of or in connection with the name of the concern that is on the container in which the flour is sold, it indicates to dealers and consumers that the flour contained in the package was ground from wheat by the concern whose name appears upon the package. And many dealers and consumers prefer to buy flour that comes directly from a concern that ground the wheat into flour rather than from one that bought the flour from a grinding concern, mixed it and packed it and then resold it, because they think that they get from such grinding concern a more uniform product or get a better product for less money because of the elimination of a middleman's profit or costs. Many persons, dealers and consumers, have been buying respondent corporation's flour believing it to be, because of the use of such words or terms in the names under which it does business and because of its representation that it is a "Manufacturer of Flour," a concern grinding wheat into flour. The crushing of wheat into flour is one of the oldest of human occupations. The act of crushing the grain into flour has always been known as willing, and the concern performing such act as a "mill," "miller" and "milling company," and this is still the significance of such terms to a large part of the trade and the consuming public. Respondent corporation's use of such words or terms in the names under which it does business and its representation that it is a manufacturer of flour tend to and do divert trade to respondent corporation from concerns actually grinding wheat into flour and selling in the States in the Southeastern section of the United States, and from concerns engaged in the same character of business as respondent

and selling in the said section of the United States, but that do not use such words or terms in the names under which they do business, or represent that they are manufacturers of flour.

CONCLUSION.

The practices of respondents under the conditions and circumstances set forth in the foregoing findings of fact are to the prejudice of the public and respondents' competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

(Seal)

C. W. Hunt,
Chairman.

Dated this 16th day of
April, A. D. 1931.

Attest:

Otis B. Johnson,
Secretary.

United States of America

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioners:
C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the matter of Snell Milling Company, a corporation, Thomas E. Snell, as President and individually, J. A. Stevens, as Vice-President and individually, Percey Myatt, as Secretary and individually.	Docket No. 1600.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answer of respondents thereto, stipulation between counsel and briefs and arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that respondents have been and are using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It Is Now Ordered that the respondents, Snell Milling Company, a corporation, Thomas E. Snell, President, and J. A. Stevens, Vice-President and each individually, their representatives, agents and employees and the representatives, agents an employees of each of them, do cease and desist from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or corporate name or any other name which includes the word "Mills" or the words

"Milling Company" or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the respondent using such words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such title or name, or by or through any such representations.

It Is Further Ordered, that the respondents above named within sixty (60) days from the notice hereof file with the Commission a report in writing setting forth in detail the manner in which this order has been complied with and conformed to.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

United States of America

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioners:
C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the matter of Snell Milling Company, a corporation, Thomas E. Snell, as President and individually, J. A. Stevens, as Vice-President and individually, Percey Myatt, as Secretary and individually.	Docket No. 1600.

ORDER OF DISMISSAL.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answer of respondents thereto, stipulation between counsel and briefs and arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that respondents have been and are using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes,"

It Is Now Ordered that the charges of said complaint against Percey Myatt be, and the same are hereby dismissed.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

United States of America

BEFORE FEDERAL TRADE COMMISSION.

In the Matter of J. A. Wells, J. M. Wilkerson, H. P. Johnson, and Mrs. H. P. Johnson, Copartners, doing business under the names of State Milling Company, and Myracle Milling Company, and individually,	Docket No. 1602

COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that H. A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: The respondents and each of them are members of a partnership which has been for three years last past and is engaged in the City of Nashville, State of Tennessee, in purchasing flour from mills located throughout the Middle West which they cause to be transported to their place of business in the City of Nashville, where it is blended and mixed with certain leavening agents such as baking powder, to produce a commodity known to the public and dealers as "self-rising flour." In the course of their business as aforesaid, the respondents have, during the period above named, practiced and are now practicing the acts and things described in the following:

Respondents solicit orders for self-rising flour produced by them, from dealers in States other than Tennessee, and contract to sell and deliver, and do sell and cause to be transported to purchasers outside the State of Tennessee, their products as above described. Respondents, in said business, are in competition with individuals, partnerships and corporations likewise engaged

in the business of selling self-rising flour in interstate commerce who either grind the flour they mix as aforesaid, or purchase the flour they so use and do not represent that they grind the flour so used. Respondents, in carrying on their business as aforesaid, solicit orders and sell their products principally through the mail service.

Paragraph Two: Respondents, in the conduct of their business as aforesaid, solicit orders and sell their products under the names of the "State Milling Company" and the "Myracle Milling Company." In connection with their business conducted under said trade names, respondents use the following letterheads:

Complaint

"STATE MILLING COMPANY
Superlative Flours
Daily Capacity 500 Barrels
Plain Flours—Self-Rising Flours."

"MYRACLE MILLING COMPANY
High-Grade
Flour
Daily Capacity 500 Barrels."

They also advertise their business as:

"State Milling Company, Manufacturers of High-Grade Flours" and "Our products are made from select wheat in a perfectly equipped mill by millers who know how." Circulars sent by them to prospective customers state, in connection with lists of their products under various brands: "Why you should buy from us. You are buying direct from the mill and thereby eliminating all unnecessary middleman's profit."

Respondents' products are sold under a number of brands, some of which are described as "Patent" and "Patent Plain." These products are packed and delivered in cotton or other bags on which are stamped the name of the particular brand and "Manufactured for Myracle Milling Company," and "Manufactured by State Milling Company" and "State Milling Company." There are no corporations or other organizations corresponding to the aforesaid trade names, "State Milling Company" and "Myracle Milling Company," and they are fictitious so far as they indicate separate businesses or plants. Respondents own or operate no mill or machinery other than certain devices for mixing flour purchased from various millers with other ingredients as above described. They grind no wheat or other cereals and own and operate no machinery fitted for that purpose.

Paragraph Three: The use by respondents of the trade names "State Milling Company" and "Myracle Milling Company," as aforesaid, in their business, and the representations on their letterheads and in their advertising and circulars, and on the bags in which their products are sold and delivered as hereinbefore described, have the capacity and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing their products from respondents they are buying flour direct from a miller and manufacturer of flour without the intervention of a middleman or any ele-

ment of cost of a middleman's profits, and to induce purchases of respondents' products by dealers and prospective purchasers on that understanding and belief; and said representations constitute unfair methods of competition with millers and manufacturers of flour likewise engaged in interstate commerce who grind the flour they offer for sale alone or mixed as self-rising flour, and with producers and sellers of self-rising flour likewise engaged in interstate commerce who do not grind and manufacture but buy said flour, made by others, used in their products, and do not represent themselves to be millers or manufacturers of flour; to the injury of said millers and producers of self-rising flour, in that said representations of respondents tend to take away their business by false representations.

Wherefore, said acts and practices of respondents are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 20th day of April, A. D., 1929, now here issues this its complaint against respondents.

NOTICE.

Notice is hereby given you, J. A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson, respondents herein, that the 4th day of June, A. D., 1929, at 10.30 o'clock in the forenoon, is hereby fixed as the time, and the offices of the Federal Trade Commission, in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required within thirty (30) days from service of the complaint, unless such time be extended by order of the Commission, to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answers and failure to answer (Rule III) provides as follows:

Complaint

(1) In case of desire to contest the proceeding the respondent shall, within 30 days from the service of the complaint, unless such time be extended by order of the Commission, file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding, or that respondent consents that the Commission may make, enter and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint, and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 20th day of April, A. D. 1929.

By the Commission:

(Seal) Otis B. Johnson,
Secretary.

THE JOINT AND SEPARATE ANSWER OF J. A. WELLS, J. M. WILKERSON, H. P. JOHNSON, AND MRS. H. P. JOHNSON, INDIVIDUALLY AND AS COPARTNERS, TO THE COMPLAINT IN THIS CAUSE FILED AGAINST THEM—Filed May 20, 1929.

Respondents for answer say:

Answering Paragraph One:

1. They admit that they and each of them are members of a partnership doing business in Nashville, Tennessee, but deny that said business is correctly described in the complaint, as to duration or method. Respondents have been engaged in the manufacture (not mixing) of self-rising flour since January 1st, 1924, at which time they purchased the good will and equipment of the State Milling Company which cost them $32,500.00. Their predecessor in the business, known as the State Milling Company, had carried on the manufacture of self-rising flour under that name in the same location since about 1912.

The making of self-rising flour consists of running raw flour and certain other ingredients through milling machinery, in a certain manner, which results in a new article, a distinct product, and is both a milling and a manufacturing process.

2. It is admitted that respondents solicit orders for self-rising flour manufactured by them from dealers in States other than Tennessee, and sell and cause their product to be transported to purchasers outside of said State.

3. It is admitted that others compete with respondents in the sale of self-rising flour, but respondents are without knowledge as to whether these competitors are individuals, partnerships, or corporations, or as to what extent, if any, they are engaged in interstate commerce.

Respondents deny that those of said competitors who are so-called "millers" grind all the self-rising flour which they sell in competition with respondents, and on the contrary aver that they, to a greater or less extent, buy flour, which they make into self-rising flour by the same process used by respondents, and put out this product in their own bags and under their own brands, and respondents insist that "unfair competition" cannot be claimed for their protection, as hereinafter shown.

Respondents are without knowledge of any so-called

blenders of self-rising flour, in competition with respondents, "who do not represent that they grind the flour so used" as alleged in the complaint.

4. Respondents deny that they solicit orders and sell their products principally through the mail—the fact being that they use not only the mail but a considerable number of salesmen.

Answering Paragraph Two:

1. It is true that respondents carry on their business and sell their products under the names of the "State Milling Company" and the "Myracle Milling Company," and respondents aver that the said business had for many years been carried on under the name of the "State Milling Company," as hereinbefore set out, and the name "Myracle Milling Company" is a trade name.

2. Respondents admit that letter heads used are used in their business, containing the word "Milling," and referring to daily capacity, etc., as alleged in the complaint, the explanation being that respondents were actually engaged in a milling process and used the trade names containing the word "Milling" without intent to deceive, and without in fact deceiving either their customers or the public; and that the statements as to daily capacity were true and likewise made without intent to deceive, and without deceiving, either their customers or the public.

3. Respondents are without knowledge of the alleged advertising matter set out in the complaint. No facts as to date, place or other means of identification are stated in the complaint. Respondents, however, deny that they customarily or habitually advertise in the manner stated, or habitually or customarily use such expressions, or expressions of like import, as seems to be charged by complainant.

Respondents are also without knowledge as to the alleged statements made in circulars—many circulars of various kinds having been sent out by respondents, and no date being given in the complaint—and they do not know whether the alleged statements quoted were made by them or by their predecessors, but aver that if the statement as to eliminating middleman's profits, etc., was made by them it was true in the sense and in the connection in which the language was used, and has reference to the fact that respondents were then soliciting trade from persons other than jobbers, and the language, if used, had reference to eliminating jobber's profits on

self-rising flour, and was not intended to deceive, and could not deceive, the purchasers to whom the circular was sent.

4. It is true that respondents' products are sold under a number of brands, some of which are described as "Patent" and "Patented Plain," but these are technical words, well known in the trade and would not, to any of respondents' customers, or to any person dealing in flour, convey the idea that respondents were grinding this flour; and in so describing respondents' brands there was no intent to deceive, and no deception of their customers.

5. It is true that the products of respondents are packed and delivered in cotton or other bags on which are stamped the name of the particular brand, and the phrases as to manufacturing, etc., quoted in the complaint, the explanation being that said products were actually manufactured, as hereinbefore set out, by a milling process, and that the names used are the trade names of respondent.

6. It is also true that there are no corporations corresponding to the names "State Milling Company" and "Myracle Milling Company," but it is denied that these are fictitious names, but are genuine trade names used in accordance with the wide-spread practice followed by partnerships in this State, and without intent to deceive, and without actually deceiving, respondents' customers.

7. Respondents deny that they own or operate no mill or machinery other than certain devices for mixing flour, etc., the fact being that the making of self-rising flour is a manufacturing process, and that respondents own the necessary machinery and equipment for said process, which was purchased by them at a considerable expense, as hereinbefore set out.

8. Respondents admits that they grind no wheat or other cereals, and own and operate no machinery fitted for that purpose, their plant and machinery being adapted to the manufacture of self-rising flour by a milling process, as hereinbefore set out.

Answering Paragraph Three:

1. Respondents deny that the use of said trade names, and any representations made on their letterheads and in their advertising and circulars, and on the bags in which their products are sold and delivered, have the capacity, and tend to lead dealers and prospective purchasers of self-rising flour to believe that in purchasing their products from respondents they are buying

flour direct from the miller and manufacturer of flour without the intervention of a middleman or any element of cost of a middleman's profit, and to induce purchases of respondents' products by dealers and prospective purchasers on that understanding and belief, as charged in the complaint. The wheat "miller" does not make self-rising flour, and cannot make it, by the use of his grinding machinery, but is compelled to first get his raw flour, either by grinding or purchase, and then by a separate milling process and by separate machinery (practically the same as that used by these respondents) turn it into self-rising flour. The "miller" who grinds his own flour has no advantage thereby, for he must absorb the local crop of wheat, which may or may not be good, whereas, the so-called "blender" can buy the best flour wherever it is produced, and can buy this flour at actual cost. The explanation of this is that by selling their surplus at actual cost the wheat-grinding "millers" are enabled to keep their mills going night and day, thus greatly reducing cost.

There is no "middleman's profit" involved unless the self-rising flour manufactured in the same way by both "miller" and "blender" is sold through a jobber; and where this is not done, and where the sale is made direct to the retailer, middleman's profits are eliminated, and this might truthfully be said to prospective purchasers.

The so-called "miller" has no advantage as to cost of manufacture, for it costs as much, or practically as much, to manufacture his raw flour as it does for respondents to buy their raw flour, which they obtain very cheaply, for the reason hereinbefore given. The production of self-rising flour is a separate milling process, as to which the so-called "miller" has no advantage, but is rather at a disadvantage.

Respondents accordingly insist that the use of the words "milling," "manufacture," etc., and the phrases alleged to be used in advertising and circulars, have no tendency to deceive, and do not in fact deceive or mislead the customers or prospective customers of respondents.

2. Respondents deny that said representations constitute unfair methods of competition, with millers and manufacturers of flour alleged to be engaged in interstate commerce, who grind the flour they offer for sale alone, or mixed as self-rising flour, and with producers of self-rising flour alleged to be engaged in interstate commerce, who do not represent themselves to be millers or manufacturers of flour, as alleged in the complaint.

Respondents further deny that they are in competition with any sellers of raw or plain flour, and deny that they claim to be manufacturers of plain flour, and deny that their customers believe them to be engaged in the manufacture and sale of plain flour.

3. Respondents deny that they have made any false representations, to the injury of said millers and producers of self-rising flour, and that they have taken away their business by false representations, as alleged in the complaint.

4. Respondents deny that said acts and practices, alleged to have been committed by respondents, are all to the prejudice of the public, and constitute unfair methods of competition within the meaning of the Federal Trade Commission Act, and aver on the contrary that this proceeding, which is in fact (although not intentionally) in the interest of a few private individuals is to the injury of the public, and not within the spirit or letter of the Act.

Answering The Whole Complaint, Respondents, in addition to the defenses hereinbefore set out, for further defense say:

1. Respondents deny that the complainant, the Federal Trade Commission, has jurisdiction of this proceeding.

2. Respondents deny that this proceeding falls within or is covered by the said Act of Congress creating the Federal Trade Commission.

3. Respondents deny that this is a proceeding in the interest of the public, and insist that the practices described in the complaint do not substantially tend to affect the public to its injury.

4. Respondents insist that this proceeding, so far from being in the interest of the consuming public, is in the interest of a few private individuals, competitors of respondents; that the effect of sustaining this proceeding will be to injure the respondents and make their competition less effective, in that they will be charged by said competitors with fraudulent and willfully unfair practices; and that the effect of so reducing the competitive power of respondent will be to ultimately raise the price to the consuming public to its injury.

5. Respondents further state that the use by them of the words "Mill," "Milling," "Manufactured," etc., has been and is in good faith and under claim of lawful right; that no fraud or deceit of any kind has been practiced on the public (none being charged in the complaint);

that there has been no substitution by respondents of an inferior for a superior article to the injury and deception of the consuming public; that the wheat miller does not manufacture self-rising flour by the use of the grinding mill, but, by the same process as that used by respondents, manufactures the same product, which is in no wise superior to the product of these respondents, but which is more apt to be inferior.

6. Respondents are without knowledge of any producers of self-rising flour (so-called "blenders") who claim to have been injured in competing with respondents by the use of the words "Mills," "Milling," or "Manufactured," and deny that any such actors are their competitors, but allege on the contrary, that the competitors who are objecting to the use of said words by respondents are individuals, firms, or corporations owning wheat grinding mills, but also engaged in the manufacture and sale of self-rising flour in competition with respondents.

With respect to such competitors, respondents insist that they are guilty of the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising and processed flour by a separate manufacturing process, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest of and for the protection of competitors who are themselves engaged in the same practices condemned by the complaint.

7. Respondents aver that their sales are made to customers who are familiar with their methods, and that none of their customers are in fact deceived or misled into thinking that they operate a wheat-grinding mill, and they aver that it would be no advantage if they did think so, for better self-rising flour can be made by the so-called "blender," as hereinbefore set out.

8. Respondents deny that they, or any of them, have represented, or led their customers or the public to believe, that middleman's profits are excluded, etc., as alleged in the complaint.

9. Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills, and manufacturing self-rising flour in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nash-

ville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, in October, 1916, handed down an opinion, which remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors.

10. Respondents for further defense submit that the complainant Federal Trade Commission, after ex parte investigation, has prejudged this case on questions of fact which are of vital, if not controlling, importance, in that its authorized agent acting in its behalf has in writing stated that said Commission was of the opinion that respondents are not engaged in a manufacturing or milling process.

Respondents do not charge any bad faith or intentional unfairness on the part of the Commission, but they submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law in this proceeding.

And respondents further submit that if the Federal Trade Commission Act is to be construed as authorizing such procedure such portion of said Act contravenes the Fifth Amendment to the Constitution of the United States, in that the Federal Trade Commission is undertaking to act at the same time as litigant and judge—which is contrary to the fundamental maxim that no man shall be a judge in his own case—but its findings of fact, although contrary to the weight of the evidence, are conclusive if supported by any material evidence, and for this reason a full review of its action by an impartial tribunal is denied, and litigants are thereby deprived of their property without due process of law.

11. Respondents further aver that they have no wish and never have had any wish or intention to use unfair methods in competition, and have never used the words "Mill," or "Manufacture," or kindred words mentioned in the complaint with any intent to deceive or make false representations of any kind, being advised, on the contrary, that said words are truthful and fully authorized

under the facts hereinbefore set out; and respondents submit that they should not be required to give up the trade names under which a valuable good will has been acquired; that this would inflict an unnecessary loss and hardship on respondents, and would in no wise benefit the public.

12. Respondents further state that they and other Nashville manufacturers of self-rising and processed flour supply a trade which is accustomed to buy in small quantities, and such service is an economic necessity in said territory, and in the interest of dealers and of the consuming public, and enables consumers to obtain these products at a lower price than would be possible if such service were withdrawn or discontinued.

Respondents further aver that all self-rising and processed flour is of the same general type, whether manufactured by the so-called "millers," or the so-called "blenders," and that competition between them can only be determined, and is in fact determined, by three factors, to-wit, price, quality, and service. The grinding of flour in a particular mill is not, and cannot be a factor.

Wherefore, respondents having fully answered, pray that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville Trust
Building,
Nashville, Tennessee.

AMENDED COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission charges that J.

A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: The respondents are members of a partnership which is engaged in the City of Nashville, State of Tennessee in the business of purchasing various lots and grades of wheat flour from mills located in the Middlewest, which they cause to be transported to their place of business in the City of Nashville and there blending and mixing the flours so purchased by them and putting up in sacks and offering for sale the mixtures or blends resulting therefrom, in some instances adding leavening agents such as baking powder to the blends or mixtures producing the commodity known to the public and in the trade as "Self-rising flour." In the course and conduct of their business as aforesaid respondents solicit orders for their products from dealers in various states other than the State of Tennessee and contract to sell and deliver and do sell and cause to be transported to purchasers outside of the State of Tennessee their products as above described. Respondents in said business are in competition with individuals, partnerships and corporations likewise engage in the business of selling wheat flour, either in plain or self-rising form, in interstate commerce who either manufacture the flour they sell by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour; or purchase the flour they offer for sale, whether as plain or self-rising, and do not in their trade names or otherwise in the conduct of their business use the terms "Mill", "Mills", "Millers" or "Milling", or otherwise represent that they are engaged in the manufacture of flour as above described, that is that they grind the wheat into the flour which they sell. Respondents in carrying on their business as aforesaid solicit orders and sell their products largely to retail grocers through the mail service.

Paragraph Two: Respondents in the course and conduct of their business as aforesaid solicit orders and sell their products and operate under the names of "State Milling Company" and "Myracle Milling Company." In connection with their business conducted under said trade names respondents use letter-heads upon which appear the following:

Amended Complaint

"STATE MILLING COMPANY
SUPERLATIVE FLOURS
Daily Capacity 500 Barrels
Plain Flours—Self-rising Flours."

"MYRACLE MILLING COMPANY
HIGH GRADE FLOUR
Daily Capacity 500 Barrels."

They also advertise their business as: "State Milling Company, Manufacturers of High Grade Flours," and "Our Products Are Made from Selected Wheat in a Perfectly Equipped Mill by Millers Who Know How." Circulars sent by them to prospective customers state, in connection with lists of their products under various brands: "Why you should buy from us. You are buying direct from the mill and thereby eliminating all unnecessary middleman's profit." In their letters circulars soliciting orders respondents make other representations implying that they are manufacturers of flour as above-described.

Respondents' products are packed, sold and delivered in cotton or other bags on which are stamped the name of the particular brand and "Manufactured for Myracle Milling Company" and "Manufactured by State Milling Company", and "State Milling Company." There are no corporations or other organizations corresponding to the aforesaid trade name. "State Milling Company" and "Myracle Milling Company," and they are fictitious so far as they indicate separate businesses or plants.

Respondents own or operate no mill or machinery other than certain devices for blending or mixing lots and grades of flour purchased from millers as above described, and adding leavening agents. They manufacture no flour by rolling or grinding or other processes of crushing wheat and extracting therefrom the product known as flour and they own or operate no mill or machinery fitted for that purpose.

Paragraph Three: The use by respondents of the trade names "State Milling Company" and "Myracle Milling Company" as aforesaid in their business and representations in their business correspondence and advertising matter and circulars and on the bags in which their products are sold and delivered as hereinabove described and otherwise have the capacity and tendency to lead dealers and prospective purchasers of plain or self-rising flours

to believe that in purchasing their products they are buying direct from a miller or manufacturer of flour as above described and without the intervention of a middleman or any element of cost of a middleman's profit, and induce purchasers of their flour by dealers and consumers on that understanding and belief; and said representations constitute unfair methods of competition with millers and manufacturers of flour likewise engaged in interstate commerce, who make as above described the flour they offer for sale, and with sellers of plain and self-rising flours likewise engaged in interstate commerce who do not so manufacture but buy and sell flour made by others and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and sellers of flour in that said representations of respondents are false and misleading and tend to take away their business.

Wherefore, said acts and practices of respondents are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties and for other purposes," approved September 26, 1914.

Wherefore, the Premises Considered, the Federal Trade Commission on this 6th day of September, A. D., 1929, now here issues its amended complaint against the respondents.

NOTICE.

Notice is hereby given you, J. A. Wells, J. M. Wilkerson, H. P. Johnson, and Mrs. H. P. Johnson, Co-partners doing business under the names State Milling Company and Myracle Milling Company, respondents herein, that the 11th day of October, A. D., 1929, at 2 o'clock in the afternoon is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required on or before said date, to file with the Commission an answer to the complaint. If answer is filed appearance on that date will not be re-

quired and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

(1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the complaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondents shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegations of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter, and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to appear to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, The Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 6th day of September, A. D., 1929.

By the Commission:

Otis B. Johnson,
Secretary.

ANSWER TO AMENDED COMPLAINT—Filed Oct. 3, 1929.

The Joint and Separate Answer of J. A. Wells, J. M. Wilkerson, H. P. Johnson, and Mrs. H. P. Johnson, individually and as copartners, to the amended complaint in this cause filed against them.

Respondents for answer say:

1. It is admitted that respondents and each of them are members of a partnership which has been engaged in the manufacture of self-rising or processed flour in the City of Nashville, Tennessee. Respondents have been engaged in the manufacture of self-rising and processed flour since January 1, 1924, at which time they purchased the good will and equipment of the State Milling Company, which cost them $32,500.00. Said State Milling Company, their predecessor, had carried on this manufacturing business in that name, in the same location, since about 1912.

It is denied that said business and the process of manufacturing said products is correctly decribed in the complaint.

2. It is admitted that respondents contract to sell, and sell and deliver their products outside the State of Tennessee.

3. It is admitted that respondents are in competition with others in making and distributing said products, but they are without knowledge as to whether said competitors are individuals, partnerships, or corporations, or as to whether they are engaged in Interstate Commerce, or as to whether they manufacture the flour sold by grinding or crushing wheat, or as to whether they purchase the flour which they offer for sale, and do not in their trade names or otherwise use the term "Mill," "Miller," or "Milling," or otherwise represent that they are engaged in the manufacture of flour, etc., as alleged in the complaint.

4. It is denied that respondents solicit orders and sell their products largely to retail grocers through the mail service.

5. Respondents deny that those of their competitors who are so-called "millers" grind all the self-rising flour which they sell in competition with respondents, and on the contrary aver that they, to a greater or less extent, buy flour from others, which they make into self-rising flour by the same methods used by respondents, and put out this product in their own bags and under their own

brands; and respondents aver that the same is true with respect to "processed" flour.

6. Respondents admit that in the conduct of their business, as aforesaid, they solicit orders and sell their products under the names of State Milling Company and Myracle Milling Company, and respondents aver that said business had for many years been carried on under the name of State Milling Company, as hereinbefore set out, and that the name Myracle Milling Company is a trade name—the conduct of business under such trade names being an ordinary practice and well recognized business usage.

7. Respondents are without knowledge of the alleged advertising matter set out in the complaint. No facts as to date, place, or other means of identification are therein stated. Respondents, however, deny that they customarily or habitually advertise in the manner stated, or habitually or customarily use such expressions, or expressions of like import, as seem to be charged in the complaint.

Respondents are also without knowledge as to the alleged statements made in circulars (no date being given in the complaint), and they do not know whether the alleged statements quoted were made at all, or if made, were made by them or by their predecessor; but aver that if the statement as to eliminating middle man's profits, etc., was made by them, it was true in the sense and in the connection with which the language was used, and has reference to the fact that respondents were then soliciting trade from persons other than jobbers, and the language, if used, had reference to eliminating jobbers' profits, and was not intended to deceive, and could not deceive the purchasers to whom such circulars were sent.

8. Respondents admit that the words "Mills," "Milling," and "Manufacturer" are used by them in connection with the letter-heads, advertising matter, and bags in the conduct of their business.

9. Respondents admit that there are no corporations corresponding to the names "State Milling Company" and "Myracle Milling Company," but they allege, as heretofore shown, that "State Milling Company" was a trade name which they purchased, and under which business had been previously conducted for many years, and that "Myracle Milling Company" is a trade name, and that the practice of doing business under various trade names is a customary and well recognized business usage.

10. Respondents deny that they own or operate no mill or machinery other than certain mixing devices, etc., and aver that they own machinery adapted to the manu-

facture of self-rising and processed flour, which is both a milling and manufacturing operation, the value of respondents' plant being approximately $.....; and of their machinery and equipment approximately $..... .....; and of their investment, capital, etc., approximately $.....; or a total investment of approximately $..... Respondents' plant has a capacity of about ———— barrels a day on a twenty-four-hour basis. In 1928 respondents did a business of approximately $.....

It is true that respondents grind no wheat, or other cereal, and own no wheat-grinding machinery.

11. Respondents deny that the use of the aforesaid trade names, with the words "mills," or "milling," separately, or in combination with the term manufacturer, or any other statements on respondents' letterheads, bags, etc., has any tendency to make dealers or prospective customers or consumers believe that they are buying flour from a "miller" and "manufacturer" without a middleman's profits, etc., as alleged in the complaint.

12. Respondents deny that any false representations are thereby made, and deny that these alleged practices, if proven, constitute any unfair competition with "millers" and makers of self-rising flour or "processed" flour alleged to be likewise engaged in Interstate Commerce, etc.

13. Respondents deny that said alleged actions have the effect of taking away business improperly from said alleged competitors, and on the contrary aver that said conduct, if proven, could have no such possible effect:

(a) Because the so-called "Millers" do not and cannot make self-rising flour with their grinding mills, but must first obtain raw flour, either by grinding it, or by purchasing the same, and then turn it into self-rising flour.

(b) Because said "Millers" obtain no advantage from making self-rising flour from the flour which they grind, but are rather at a disadvantage, both as to cost of production of the raw flour, and as to its quality, as will be shown at the hearing.

(c) Because self-rising and processed flour, no matter by whom made or sold, is essentially the same product destined for consumption in a particular region, and the buyers of such flour are governed by only three factors, to-wit; price, quality and service.

(d) Because there is no pretense in the complaint that self-rising or processed flour made by the so-called "miller" is any better than that manufactured by the so-

called "blender," and there is no deception of the public by substituting an inferior for a superior article.

14. Respondents aver that those of their competitors who are "millers" follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors who are themselves engaged, as against respondents, in the same practices condemned by the complaint.

15. Respondents deny, as hereinbefore set out, that the use of the words "Mills," "Milling," or "Manufacturer," misleads, or has a tendency to mislead, any substantial portion of the purchasing or consuming public, in that they may be led to believe that they are buying from one who grinds his wheat. But respondents are willing to cut off the possibility of deceiving, or misleading, any purchaser or customer through the use of the words above quoted, and to this end have heretofore offered, and hereby offer, to place on their letter-heads, bags, invoices, etc., in conspicuous lettering the words:

"Not Grinders of Wheat"

Respondents believe and state that they are "millers" and "manufacturers"—in that they turn out a distinct product by the use of milling machinery—but they are not, and do no claim to be, grinders of wheat, and are willing that this be distinctly and unequivocally stated.

16. Respondents, under the trade names aforesaid, have acquired a valuable good will, and they insist that it would be unjust and inequitable to deprive them of this.

Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, in October 1916 handed down an opinion, with remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour

were engaged in a "milling" and " manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors, thereby depriving respondents of the valuable good will which they have built up.

17. Respondents deny that this proceeding is in the interest of the public, as claimed in the complaint, and allege on the contrary that said proceeding is actually (though not intentionally) in the interest of a few private individuals, competitors of the so-called "blenders" and that its tendency and effect, if sustained, will be to injure and exploit the consuming public for the benefit of private individuals. Respondents insist that the practices described in the complaint do not substantially tend to affect the public to its injury; deny that this proceeding falls within or is covered by the Act of Congress creating the Federal Trade Commission; and deny that the Complainant, Federal Trade Commission, has jurisdiction of this proceeding.

18. Respondents submit that Section 5 of the Federal Trade Commission Act, and the procedure thereunder, violate the Fifth Amendment to the Constitution of the United States, in that said Federal Trade Commission is not and cannot be impartial, since it acts both as plaintiff and judge in the same proceeding, and because its findings, however erroneous, and however opposed to the weight of evidence, are binding and conclusive on review if supported by any material evidence, and thus a full review by an impartial tribunal is denied, and the litigants before said Commission are thereby deprived of due process of law.

Respondents further submit that the Complainant, Federal Trade Commission, after exparte investigation, has prejudged this case on questions of fact, which are of vital, if not controlling importance.

Respondents do not charge any bad faith, or intentional unfairness, on the part of the Commission, but submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law in this proceeding.

And now having fully answered, repsondents pray that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville Trust Bldg.,
Nashville, Tennessee.

United States of America

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 19th day of October, A. D., 1929.

Commissioners:
Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matters of	
Royal Milling Co., et al.,	Docket No. 1597
Tennessee Grain Co.,	Docket No. 1598
Nashville Roller Mills,	Docket No. 1599
Snell Milling Co.,	Docket No. 1600
Watauga Milling Co., et al.,	Docket No. 1601
State Milling Co., et al.,	Docket No. 1602
Cherokee Mills., et al.	Docket No. 1604

ORDER.

The above-entitled matters coming on for consideration by the Commission on the suggested solutions of the issues raised in the complaints filed July 12, 1929 by Thomas H. Malone, counsel for respondents, and the Commission now being fully advised in the premises,

It is Ordered that said suggested solutions be considered at that time of final argument on the merits.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

STIPULATION OF COUNSEL.

In the above styled matter it is stipulated and agreed between Baldwin B. Bane, Esq., counsel for Federal Trade Commission, and Thomas H. Malone, counsel for respondents, and subject to the approval of the Federal Trade Commission:

I. That all evidence taken in the case of Francis J. McCarthy, doing business under the names of Watauga Milling Company, etc., (Docket No. 1601), may be considered as part of the evidence herein.

II. That the matters hereinafter covered by further stipulation in this cause may be considered in said cause of Francis J. McCarthy, doing business, etc., (Docket No. 1601), so far as they may be material to the general issues raised by the pleadings.

III. That in addition to the evidence in said cause (Docket No. 1601) the following additional facts are stipulated with reference to this cause:

1. That said business was begun in the City of Nashville, Tennessee, by the above respondents, on January 1, 1924, at which time they purchased the good-will and equipment of the State Milling Company for the sum of $32,500.00. Said State Milling Company (their predecessor) had carried on this business under that name, in the same location, since about 1912.

2. That said partnership is engaged in making both "self-rising" flour and also what is described in the testimony of respondent Francis J. McCarthy (in Docket No. 1601) as "processed" flour—said operations being conducted along the same lines and by machinery of the same type as that employed and used by the respondent Francis J. McCarthy.

3. That said partnership also does business under the trade name "Myracle Milling Company."

4. That the brands put out by said partnership under the name "State Milling Company" are as follows:

"Every Woman"—"Standard Patent."
"White Seal"—"Highest Patent."
"No Peer"—"Superlative Patent."
"Red Bird"—"Standard Patent Self-rising."
"Alfixt"—"Highest Patent Self-rising."
"White Poppy"—"Superlative Patent Self-rising."

5. That the brands put out by said partnership under the trade name "Myracle Milling Company" are as follows:

Stipulation of Counsel

"Wonder Worker"—"Standard Patent Plain."
"Dixie Dandy"—"Family Patent Plain."
"Southern Made"—"High Patent Plain."

6. That exhibits 1 to 13 inclusive constitute advertisements made, or letters written, by said partnership to customers, or prospective customers, under the dates shown by the respective exhibits.

7. That exhibits 14 to 26 inclusive, to the stipulation, show the bags, brands, etc., used by said partnership in carrying on its business.

8. That said partnership, in carrying on its business, buys and sells in Interstate Commerce.

9. That of the flour which goes through the processes already described, in its plant, and is afterwards sold to the trade, approximately 50% is "self-rising," and approximately 50% is "processed."

10. Said partnership solicits orders from and sells its products almost exclusively to the retail merchants. This solicitation is accomplished through brokers and by mail direct to the retailer. Business is not solicited from wholesalers.

11. That the total sales made by said partnership, for the year 1929, amounted in dollars and cents to approximately $313,757.44, and the total business in barrels amounted to approximately 51,996.

12. That on February 20, 1929, a letter was addressed to said State Milling Company by Web Woodfil, Chief Trial Examiner, Federal Trade Commission, enclosing a proposed stipulation—said letter being made exhibit 27 hereto, and said proposed stipulation exhibit 28. These exhibits are subject to the same objections, ruling of the Examiner, and exceptions made with reference to the offer of similar exhibits in Docket 1601, R. p. 1066, et seq., respondents' exhibits for identification 71 and 72.

13. That a proposed solution of the controversy between these respondents and the Federal Trade Commission was offered, under date of July 12, 1929—the nature of said proposed solution, and the action of the Commission thereon being as shown in the testimony of the witness Vernon S. Tupper, in said cause in Docket No. 1601, at pages 1071 and 1072 of the record therein.

IV. That the Federal Trade Commission wrote these respondents, and also the respondents in Docket 1597 (Royal Milling Company), Docket 1598 (Tennessee Grain Co. and Tennessee Milling Co.), Docket 1599 (Nashville Roller Mills), Docket 1600 (Snell Milling Co.), Docket 1601 (Watauga Milling Co.), Docket 1604 (Cherokee

Mills), Docket 1607 (Old Hickory Mills), Docket 1617 (Southern Milling Co.), and also Mero Mills, (which, it is stipulated, is the same Mero Mills mentioned in the testimony of the witness Thomas E. Snell in Docket 1601 at pages 934, et seq, of the record), a letter similar in form to respondents' exhibit 68, as shown in the testimony of the witness Vernon S. Tupper in Docket No. 1601, at page 1039 of the record, requesting from each a list of twenty-five customers; that nine of the above named concerns complied with said request; and that from the names so furnished the Federal Trade Commission obtained the twenty-five merchants or dealers, who were examined in chief on behalf of the Commission in said cause, Docket No. 1601, with the exception of the following two witnesses—Walter Cunningham and C. S. Ragland.

V. That to prevent the expense, delay and trouble incident to a separate trial of this cause, the same may be heard and determined by the Commission in connection with said cause of Francis J. McCarthy, doing business, etc., Docket No. 1601,—it being agreed that the evidence introduced in said cause (Docket No. 1601) may be looked to by either party as if taken in this cause, and with respect to these respondents, except in so far as changed by this stipulation, and that the record therein shall constitute part of his record.

Thomas H. Malone,
for Respondent.
Baldwin B. Bane.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioners:
C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of J. A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson co-partners doing business under the names State Milling Company and Myracle Milling Company, and individually.	Docket No. 1602.

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served an amended complaint upon the respondents above named charging them with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

The respondents having entered their appearances and having filed their answer herein, a stipulation as to the facts was entered into between counsel for the respondents and counsel for the Commission in which it was stipulated and agreed that the Federal Trade Commission should take such stipulation as to the facts in lieu of testimony.

Thereupon this proceeding came on for final hearing on the briefs submitted by counsel for the Commission and counsel for the respondents and argument by counsel for the Commission and counsel for the respondents, and the Commission having duly considered the record and be-

ing fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

Paragraph One: Respondents, J. A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson conduct business under the names State Milling Company and Myracle Milling Company. They have conducted such business since January 1, 1924, when they purchased the good will and equipment of a predecessor which had conducted the same business under the name State Milling Company since about 1912. Respondents' place of business is located in Nashville, Tennessee. Respondents are engaged in the business of buying flour from concerns that grind wheat into flour and then mixing such flours, in some instances adding phosphate, and in other instances adding salt, soda, and phosphate, which makes the flour ready for use without the addition of baking powder, and thus gives to it the name of self-rising flour.

They then pack the flour in bags under brands of their respective names, and sell it to dealers located in various states of the United States, but particularly in the Southeastern States. Respondents buy the flour from concerns grinding wheat into flour and located at various points throughout the United States. This flour is shipped to them at Nashville, Tennessee, from which point they ship the flour to their customers. In the course and conduct of their business respondents are in competition with other co-partnerships, corporations and individuals engaged in the sale of flour in interstate commerce.

Paragraph Two: Respondents put the flour which they buy from concerns located at various points throughout the United States in what is called a batch mixer, where it is stirred up and mixed together. Usually but not always two or more flours are so mixed or stirred up together. If the flour is to be self-rising there is added in this mixer the correct proportions of salt, soda and phosphate. If it is not to be self-rising a little phosphate is added in the mixer. The flour is then run from this batch mixer into bins, from which it goes to a draver feeder which feeds the flour into elevator cups, which carry it to the reel or sifter, from whence it goes, after being sifted, into hopper bins, and thence to the packer where it is packed into bags of the desired sizes. There is no grinding process in the operation. Respondents sell from 3 to 6 brands of flour under each trade name, but each brand does not represent a different grade or quality of flour. It takes from 10 to 15 minutes to run the flour through the equipment used by respondents. The cost of the machin-

ery in such a plant as the respondents', having a capacity of 3,000 barrels a day on a 24 hour run is approximately $20,000 to $25,000, and the total investment approximately $150,000 to $200,000.

Paragraph Three: The grinding of wheat into flour has developed by various steps until today it has become a refined, complex, and scientific process. Roughly, the operations which constitute the process are: (1) cleaning and otherwise preparing the grain for grinding; (2) the grinding or reduction of the grain; (3) the bolting or sifting operation; (4) purification and preparation of the product by blowing air through it, adding phosphates, bleaching agents, etc. The modern method of grinding wheat substitutes for the single grinding between millstones a succession of grindings between several sets of iron or porcelain rollers. The wheat when received at the mill is unloaded into elevators or bins, and is thoroughly screened and dry cleaned and scoured by machines especially adapted for that purpose. This process itself is quite complicated, requiring a great deal of machinery. The wheat is analyzed and graded and then tempered and conditioned, preparatory to being ground. It is then passed through the rollers, each passage through a pair of rollers being called a break, and different concerns using numbers of breaks. After each break the product is sifted or bolted, and the results of the siftings go into various streams, which are carried to other sets of rollers where they are again crushed or broken, the process being a continuous operation. A five break mill has eighteen spans of rolls and thirty-two separations. Each break effects a mechanical separation. The bolting or sifting separates the results of the breaks into various streams and products, such as flour, middlings, offals, bran, shorts, etc. The bolting or sifting machine is commonly referred to as a reel. After the flour has gone through the rolls it is again bolted or sifted, and then sent to the packing room. The flour is milled to definite standards in order to insure uniformity. The wheats for the various brands of flour made by the mill are selected by the chemist and the superintendent from reports which are on file in the superintendent's and chemist's offices, showing the characteristics and chemical constituents of the wheats. Concerns grinding wheat into flour are known as "Manufacturers of Flour." Bolting or sifting has been done by the concerns grinding the wheat into flour in this country from the earliest times. The number of boltings or siftings

differs in different mills, and is of importance in determining the appearance of the flour. Bolting or sifting is but a part of the process of preparing the flour. Concerns grinding wheat into flour bleach the flour, the bleaching agent being added on the mill stream. This bleaching matures or ages the flour, thus improving its baking qualities, and whitens it. Concerns grinding wheat into flour blend flours by a blending of the wheats after a chemical analysis of such wheats, and by blending the various streams of flour produced by the different breakings of the wheat berry between the various rolls in the mill. Concerns grinding wheat into flour maintain a laboratory and an experimental mill in charge of a chemist, in which the wheats and flours are analyzed and tested in order to determine their various characteristics, such as gluten content, protein content, moistrue content, ash content, etc., in order to keep each of the brands of flour put out by such concerns uniform. It is only from chemical tests that such contents of the flour can be determined and the uniformity of each brand maintained. These characteristics determine the grade and quality of the flour. Unless these characteristics of the flour are maintained practically uniform in each brand of flour, the flour cannot be kept up to one standard. Concerns grinding wheat into flour are very jealous of their grades and brands, and guard and protect them with great care. All mills in the process of grinding the wheat and preparing the flour make or produce several grades of flour. These are, in the order of the best and highest priced grades: patent flour, which means that part of the stream of flour which is left after taking off a greater or less per cent of the inferior flour—it is the best flour made by the mill; straight flour, which means one hundred per cent flour, all the flour that is extracted from the wheat berry; clear flour is the flour taken off by the mill after the patent flour has been removed; low grade flour designates all of the lowest grades made by the particular mill. These terms indicate with different mills' flours of widely different qualities. The cost of the machinery for a concern grinding wheat into flour with a capacity of about 3,000 barrels a day is about $600,000, and the total investment between $1,000,000 and $1,500,000. The time required for preparing the wheat and producing the flour by such a concern is from eight hours to fifty or sixty hours, due to differences in time required for tempering the wheat. But if the tempering time is excluded, the time required is from a half

hour to one and a half hours, depending upon the number of breaks and boltings used by the concern.

Paragraph Four: Practically all concerns grinding wheat into flour add phosphate to the flour on the mill stream, that is, as the flour is run through the mill. This addition is for the purpose of whitening the baked product and counteracting an overdose of soda. Self-rising flour is flour to which there has been added in correct proportions salt, soda, and phosphate, so that the flour is ready for use without the addition of baking powder by the cook. It is particularly adapted to the making of biscuits. A formula for mixing self-rising flour was discovered by Professor Liebig about seventy-five years ago. The self-rising flour business was originated or begun in Nashville, Tennessee, by a Dr. Owsley. He operated under the name Owsley Flour Company and sold through the Southeastern States. This company was succeeded by the Ford Flour Company about 1897, which concern is still in existence and selling self-rising and plain or phosphated flour throughout the South. The concerns originating the mixing of self-rising flour in Nashville and not grinding wheat into flour did not call themselves mills or milling companies, or manufacturers of flour. Most of those actually grinding wheat into flour and selling in the Southeastern States mix and sell self-rising flour, and such is usually produced directly from the mill stream—that is, by running the mill stream directly into mixers where the self-rising ingredients are added before the flour is finally bolted and packed. Respondents sell in competition with those actually grinding wheat into flour, and in competition with those engaged in the same character of business as respondents and who do not represent themselves as mills or milling companies, or manufacturers of flour.

Paragraph Five: Nashville, Tennessee, is the center of the flour industry in the South. There are several concerns located there grinding wheat into flour, and other concerns used to be located there that ground wheat into flour. There are approximately 170 concerns actually grinding wheat into flour and selling in the Southeastern territory.

Paragraph Six: Respondents do not have or maintain a laboratory for testing or analyzing the flours which they buy or sell. They use regularly only the so-called paddle test, which consists in simply putting the flour on a paddle and looking at it. By this test the characteristics or qualities of the flours, such as gluten content, pro-

tein content, moisture content, starch content, etc., cannot be determined. Only the relative appearance of the two flours can be gotten from such a test, and this is of little value in approximating even the grade of the flour, because practically all concerns grinding wheat into flour add phosphate and a bleaching agent to the flour on the mill stream. Different concerns add different amounts of such, and a greater amount of bleaching makes a lower grade of flour appear better. Practically no two concerns grinding wheat into flour grind exactly alike. Some granulate the flour finer than others, and some add a larger proportion of the total break of the wheat berry to their various grades of flour than do others. A difference in the granulation of the flour and in the amount of the total break of the wheat berry contained in the flour affects very materially the appearance of the flour. The quality and characteristics of the flour cannot be determined by the paddle test, and respondents by this test cannot maintain uniformity of brands or grades. The grade and quality of all flours are determined by their chemical analysis. The quality or grade of the flour is not changed by mixing self-rising ingredients with it and running it through the equipment in respondents' plant. From time immemorial there have been plants buying and blending flour but not grinding wheat into flour, which plants were known as blending plants and not called or known as mills or milling companies, or manufacturers of flour. Such terms have from time immemorial been applied in the flour trade only to the grinding of the grain.

Paragraph Seven: Respondents represent themselves as "State Milling Company. Manufacturers of High Grade Flours. Daily Capacity 500 Barrels," and "Myracle Milling Company. High Grade Flour. Daily Capacity 500 Barrels." In the letters, circulars and literature which respondents circulate among the trade in their efforts to sell flour they make such statements as the following:

> "Our products are made from select wheat in a perfectly equipped mill by millers who know how."

And:

> "We are very anxious for you to give our flour a trial for it is made from the best #2 red wheat which produces a product unequalled and our overhead is very light which enables us to sell cheaper than most of our competitors.

Findings as to the Facts and Conclusion

"We are selling considerable flour in your state, both in carload lots and in smaller amounts and it is giving universal satisfaction. Each bag leaving our Mill carries an absolute Guarantee of Perfect Satisfaction or Money Refunded."

And:

"We are glad to be able to give you advantage of the exceedingly good purchases we have made in wheat and we now call your attention to our Greatly Reduced Prices. We believe this is the opportune time for you to buy and you will make no mistake in replenishing your stock to its full capacity.

"When you buy from us you are buying direct from the mill, thereby eliminating all unnecessary middleman's profit. Our flour is made from #2 soft red wheat acknowledged to be the best wheat grown for the manufacture of flour, and we invite a comparison of its quality with any other flour regardless of price."

And:

"For the past six weeks we have had a nice stock of wheat on hand and have been giving you the advantage of it by quoting you considerable lower than the market, however our supply bought on the lower market is about exhausted and today cash wheat is very strong and shorts and bran have gone up some $4 per ton making flour advance in proportion to this. We have held off as long as we can and we are now forced to raise prices but we are going to make the smallest possible one in order to get by. You will not be able to duplicate the quality of our flour elsewhere without paying quite a bit more and we trust you will let us Serve You All Your Needs."

Paragraph Eight: The containers for respondents' flour have on them the trade name under which they are selling the particular flour such as "Manufactured by State Milling Company," "Manufactured by Myracle Milling Company." In addition there appears upon the containers for the flour the brand name and a designation of the type of the flour such as "Red Bird. Self-Rising Flour," "Southern Maid. Superlative Patent Flour," "Wonder Worker. Standard Patent Flour," "No Peer. Highest Patent Flour," "Every Woman. High Quality Flour," "Alfixt. Self-Rising Flour."

Findings as to the Facts and Conclusion

There is no such term as "process flour" or "processed flour" in the flour or milling industry. Such terms have no significance in the trade. Neither the word "process" nor the word "processed" appears anywhere on any of respondents' bags, labels, or containers, or in any of their literature as descriptive of any of their flour. The term "process flour" or "processed flour" could only mean flour handled twice, run through the mixing machines and packed in sizes suitable for the family trade, or a low grade or off grade flour that has been mixed with good flour to bring the grade up to a suitable standard.

Paragraph Nine: When the term "mills" or "Milling company," or "manufacturer of flour" is used in the flour industry it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour. When either of such is used in the name of or in connection with the name of the concern that is on the container in which the flour is sold, it indicates to dealers and consumers that the flour contained in the package was ground from wheat by the concern whose name appears upon the package. And many dealers and consumers prefer to buy flour that comes directly from a concern that ground the wheat into flour rather than from one that bought the flour from a grinding concern, mixed it and packed it and then resold it, because they think that they get from such grinding concern a more uniform product or get a better product for less money because of the elimination of a middleman's profit or costs. Many persons, dealers and consumers, have been buying respondents' flour believing them to be, because of the use of such words or terms in the names under which they do business and because of their representation that they are "Manufacturers of Flour," a concern grinding wheat into flour. The crushing of wheat into flour is one of the oldest of human occupations. The act of crushing the grain into flour has always been known as milling, and the concern performing such act as a "mill," "miller" and "milling company," and this is still the significance of such terms to a large part of the trade and the consuming public. Respondents' use of such words or terms in the names under which they do business and their representation that they are manufacturers of flour tend to and do divert trade to respondents from concerns actually grinding wheat into flour and selling in the States in the Southeastern section of the United States, and from concerns engaged

in the same character of business as respondents and selling in the said section of the United States, but that do not use such words or terms in the names under which they do business, or represent that they are manufacturers of flour.

CONCLUSION.

The practices of respondents under the conditions and circumstances set forth in the foregoing findings of fact are to the prejudice of the public and respondents' competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

C. W. Hunt,
Chairman.

(Seal)

Dated this 16th day of April, A. D. 1931.

Attest:

Otis B. Johnson,
Secretary.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioners:
C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of J. A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson co-partners doing business under the names State Milling Company and Myracle Milling Company, and individually.	Docket No. 1602.

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answer of respondents thereto, stipulation between counsel and briefs and arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that respondents have been and are using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It Is Now Ordered that the respondents, J. A. Wells, J. M. Wilkerson, H. P. Johnson and Mrs. H. P. Johnson co-partners doing business under the names State Milling Company and Myracle Milling Company, as co-partners and individually, their representatives, agents and employees and the representatives, agents and employees of each of them, do cease and desist from carrying on the business of selling flour in commerce among the several

States of the United States under a trade name or any other name which includes the words "Milling Company" or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such words or making such representations, actually owns and operates or directly and absolutely controls a fatcory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such title or name, or by or through any such representations.

It Is Further Ordered, that the respondents above named within sixty (60) days from the notice thereof file with the Commission a report in writing setting forth in detail the manner in which this order has been complied with and conformed to.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

United States of America

BEFORE FEDERAL TRADE COMMISSION

In the Matter of E. C. Faircloth, Jr., E. C. Faircloth, Sr., F. B. Evers, and Estate of C. K. Evers, Copartners, doing business under the name of Cherokee Mills, and individually.	Docket No. 1604.

COMPLAINT.

Acting in the public interest, pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission to define its powers and duties, and for other purposes," the Federal Trade Commission charges that E. C. Faircloth, Jr., E. C. Faircloth, Sr., F. B. Evers and the estate of C. K. Evers, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: The respondents and each of them are members of a partnership which has been for three years last past and is engaged, in the City of Nashville, State of Tennessee, in the business of purchasing flour from flour mills in various States of the Middle West, which they cause to be transported to their place of business in the City of Nashville where it is blended and mixed with certain leavening agents such as baking powder, to produce a commodity known to the public and dealers as "self-rising flour." In the course of their business as aforesaid, the respondents have, during the period above named, practiced and are now practicing the acts and things described in the following:

Respondents solicit orders for their products from dealers in various States other than Tennessee, and contract to sell and deliver, and do sell and cause to be transported to purchasers outside of the State of Tennessee their products as above described. Respondents in said business are in competition with individuals, partnerships and corporations likewise engaged in the business of selling self-rising flour in interstate commerce

who either grind the flour they mix as aforesaid, or purchase the flour they so use, and do not represent that they grind the flour so used. Respondents, in carrying on their business as aforesaid, solicit orders and sell their products principally to retail grocers, through the mail service.

Paragraph Two: Respondents also operate a plant in the City of Birmingham, Alabama, for the preparation of self-rising flour as above described, and conduct the sale of their products at said plant under the names of Cherokee Mills and Alabama Flour Company.

Paragraph Three: In connection with their business conducted under said trade names respondents, in their correspondence soliciting orders and selling their products as aforesaid, use the following letter heads:

"CHEROKEE MILLS
Capital $500,000.
Quality Flour."

On the letterhead also appears a picture of extensive buildings with large advertising signs across them reading "Cherokee Mills, High Grade Flour." In some of their form letters circulated in the course of their business as aforesaid, respondents represent: "Daily Capacity 2,000 Barrels," "Tip-Top Finest Patent Plain Flour." In their letters soliciting orders, respondents use other representations implying that they are millers and grinders of flour.

Respondents' products are sold under a number of brands. These products are packed and delivered in cotton or other bags on which are stamped in conspicuous letters the name "Cherokee Mills" and "Fancy Patent," "High Patent Flour," "Finest Patent," etc., as well as "Self-Rising."

Paragraph Four: Respondents own or operate no mill or machinery other than devices for mixing flour, purchased by them, with other ingredients as above described, and do not grind the flour they sell.

Paragraph Five: The use by the respondents of the name "Cherokee Mills" in their business and the representations in their business correspondence and otherwise as aforesaid, have the capacity and tend to lead dealers and prospective purchasers of their products to believe that in purchasing them they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman or any element of cost of a middleman's profits, and to induce purchases of their

flour by dealers and prospective purchasers on that understanding and belief; and said practices constitute unfair methods of competition with millers and manufacturers of flour likewise engaged in interstate commerce who grind the flour they offer for sale, alone or mixed as self-rising flour, and with producers and sellers of self-rising flour, likewise engaged in interstate commerce, who do not grind and manufacture, but buy and sell flour, made by others, used in their products, and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and producers of self-rising flour, in that said practices of respondent tend to take away their business by false representations.

Wherefore, said acts and practices of respondents are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes," approved September 26, 1914.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 22nd day of April, A. D., 1929, now here issues this its complaint against respondent.

NOTICE.

Notice is hereby given you, E. C. Faircloth, Jr., E. C. Faircloth, Sr., F. B. Evers, and Estate of C. K. Evers, respondents herein, that the 6th day of June, A. D., 1929, at 10:30 o'clock in the forenoon, is hereby fixed as the time, and the office of the Federal Trade Commission, in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required within thirty (30) days from service of the complaint, unless such time be extended by order of the Commission, to file with the Commission an answer to the complaint. After filing answer you will be given reasonable notice of the time set for hearing. The Rules of Practice adopted by the Commission with respect to answers and failure to answer (Rule III) provide as follows:

(1) In case respondent shall desire to contest the proceeding such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to file them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 22nd day of April, A. D. 1929.

By the Commission:

Otis B. Johnson,
Secretary.

(Seal)

THE JOINT AND SEPARATE ANSWER OF E. C. FAIRCLOTH, JR., F. B. EVERS, AND ESTATE OF C. K. EVERS, TO THE COMPLAINT IN THIS CAUSE FILED AGAINST THEM—Filed May 22, 1929.

Respondents for answer say:

Answering Paragraph One:

1. It is admitted that there is a partnership engaged in the making of self-rising flour, in Nashville, Tennessee, under the name and style of "Cherokee Mills," but the members of said partnership and the nature and duration of the business are not correctly stated in the complaint, the facts being that the business was started under the name of "Cherokee Mills," in 1910, by E. C. Faircloth, Sr., and C. K. Evers, both of whom are now dead; that said business has been carried on since said date; that the present members of said partnership are Estate of E. C. Faircloth, Sr., Estate of C. K. Evers, E. C. Faircloth, Jr., F. W. Faircloth, and F. B. Evers; and that said partnership, in producing self-rising flour, is engaged in both a milling and manufacturing process, whereby, through the use of machinery, raw flour and other ingredients are turned into a separate product.

2. Respondents admit that they solicit orders for their products from dealers in various States other than Tennessee, and sell said products, and cause the same to be transported to purchasers outside the State of Tennessee.

3. Respondents admit that others compete with them in the sale of self-rising flour, but respondents are without knowledge as to whether these competitors are individuals, partnerships, or corporations, or as to what extent, if any, they are engaged in interstate commerce.

4. Respondents deny that those of said competitors who are so-called "millers" grind all the self-rising flour which they sell in competition with respondents, and on the contrary aver that they, to a greater or less extent, buy flour which they make into self-rising flour by the same process used by respondents, and put out this product in their own bags, and under their own brands, and respondents insist that "unfair competition" cannot be claimed for their protection, as hereinafter shown. Respondents are without knowledge of any so-called "blenders" of self-rising flour in competition with respondents who "do not represent that they grind the flour so used," as alleged in the complaint.

Joint and Separate Answer of Respondents, etc.

5. Respondents deny that they solicit orders and sell their products principally to retail grocers through the mail service.

6. Respondents aver that in addition to the manufacture of self-rising flour, as hereinbefore set out, said partnership since 1925 has owned and operated a grinding plant for the manufacture of stock feed.

Answering Paragraph Two:

Respondents admit that they operate a plant in the City of Birmingham, Alabama, for the manufacture of self-rising flour by the milling process, hereinbefore mentioned, and that they conduct the sale of their products for said plant under the names of "Cherokee Mills" and "Alabama Flour Company," and they aver that this business was begun in 1922.

Answering Paragraph Three:

1. It is true that respondents use letter heads in their business correspondence containing the words "Cherokee Mills," and that on the letter heads is shown a picture of an extensive building, with the words "Cherokee Mills," "High Grade Flours," but respondents aver that this is merely a photograph of their plant, and deny that said letter heads are correctly described (except to the extent already noted) in the complaint.

2. Respondents deny the conclusion (no facts being stated in the complaint) that in their letters soliciting orders they use other representations (or any representations) implying that they are grinders of flour.

3. Respondents are without knowledge of the particular form letters mentioned in the complaint, no date or other means of identification being stated; but they aver that the words "Patent Plain Flour" have a technical meaning, well known in the flour business, and would not lead their customers or any one else conversant with said business, to believe that they were thereby holding themselves out as grinders or producers of raw flour.

4. It is true that respondents' products are sold under a number of brands, and delivered in cotton or other bags on which the name of the brand appears, and also the name "Cherokee Mills"; but respondents deny that except to this extent the lettering on said bags is correctly described in the complaint.

Answering Paragraph Four:

1. It is true that respondents do not grind the flour which they sell, nor have they ever claimed to do so,

their grinding operation being limited to the manufacture of feed, as hereinbefore set out; but respondents deny that they own or operate no mill or machinery other than devices for mixing flour, etc., the fact being that they are not only actually engaged in the manufacture of feed, as hereinabove set forth, but are engaged in the production of self-rising flour, which is itself both a milling and a manufacturing process.

2. Respondents aver that the value of their buildings, machinery, equipment, etc., (Nashville and Birmingham plants combined) is approximately $165,000.00, of which approximately $130,000.00 represents the value of the Nashville plant.

Answering Paragraph Five:

1. Respondents deny that the use by respondents of the name "Cherokee Mills" in their business, and the alleged representations in their business correspondence and otherwise (no facts in this behalf being stated in the complaint) have the capacity and tend to lead dealers and prospective purchasers of their products to believe that in so purchasing they are buying flour direct from a miller and manufacturer of flour, without the intervention of a middleman, or any element of cost of a middleman's profits, and to induce purchases of their flour by dealers and respective purchasers on that understanding and belief, as alleged in the complaint.

2. Respondents aver that the "miller" does not, and cannot, make self-rising flour by the use of his grinding machinery, but is compelled to first get his raw flour, either by grinding or purchase, and then by a separate milling process and by separate machinery (practically the same as that used by these respondents) turn it into self-rising flour. The "miller" who grinds his own flour has no advantage thereby, for he must absorb the local crop of wheat, which may or may not be good, whereas the so-called "blender" can buy the best flour wherever it is produced, and can buy such flour at actual cost. The explanation of this is that by selling their surplus at actual cost the wheat-grinding millers from whom he purchases are enabled to keep their mills going night and day, thus greatly reducing cost.

3. Respondents aver that there is no "middleman's profit" involved unless the self-rising flour which has been manufactured, as aforesaid, in the same way by both "miller" and "blender" is sold through a jobber, and where this is not done and where the sale is made

direct to the retailer middleman's profits on self-rising flour are in fact eliminated.

4. Respondents further aver that the so-called "miller" has no advantage as to cost of manufacture, for it costs him as much, or practically as much, to manufacture his raw flour as it does for respondents to buy their raw flour, which they obtain very cheaply for the reason hereinbefore stated. The production of self-rising flour is, as aforesaid, a separate milling process, as to which the so-called "miller" has no advantage, but is rather at a disadvantage.

5. Respondents further deny that said practices constitute unfair methods of competition with millers and manufacturers of flour alleged to be engaged in interstate commerce who grind the flour they offer for sale alone, or mixed as self-rising flour, and with the producers of self-rising flour alleged to be engaged in interstate commerce who do not represent themselves to be millers or manufacturers of flour, as alleged in the complaint.

Respondents further deny that they are in competition with any sellers of raw or plain flour, and deny that they claim to be manufacturers of plain flour, and deny that their customers believe them to be engaged in the manufacture and sale of plain flour.

6. Respondents deny that they have made any false representations to the injury of said millers" and producers of self-rising flour, and that they have taken away their business by false representations, as alleged in the complaint.

7. Respondents deny that said acts and practices alleged to have been committed by respondents are all to the prejudice of the public and constitute unfair methods of competition within the meaning of the Federal Trade Commission Act, and aver on the contrary that this proceeding, which is in fact (although not intentionally) in the interest of a few private individuals, is to the injury of the public, and not within the spirit or letter of the Act.

Answering the Whole Complaint, respondents, in addition to the defenses hereinbefore set out, for further defense say:

1. Respondents deny that complainant, the Federal Trade Commission, has jurisdiction of this proceeding.

2. Respondents deny that this proceeding falls within or is covered by the said Act of Congress creating the Federal Trade Commission.

3. Respondents deny that this is a proceeding in the interest of the public, and insist that the practices de-

scribed in the complaint do not substantially tend to affect the public to its injury.

4. Respondents insist that this proceeding, so far from being in the interest of the consuming public, is in fact (although not intentionally) in the interest of a few private individuals, competitors of respondents; that the effect of sustaining this proceeding will be to injure respondents, and make their competition less effective, in that they will be charged by said competitors with fraudulent and willfully unfair practices; and that the effect of so reducing the competitive power of respondents will be to ultimately raise the price to the consuming public to its injury.

5. Respondents further state that the use by them of the word "Mills" has been and is in good faith and under claim of lawful right, and is justified by the strictest interpretation of the term, in that respondents, as part of their business, are engaged in grinding feed, as aforesaid; that no fraud or deceit of any kind has been practiced on the public (none being charged in the complaint); that there has been no substitution by respondents of an inferior for a superior article to the injury and deception of the consuming public; that the wheat "miller" does not manufacture self-rising flour by the use of his grinding mill, but by the same process as that used by respondents manufactures the same self-rising flour, which is in no wise superior to the product of respondents, but which is more apt to be inferior.

6. Respondents are without knowledge of any producers of self-rising flour (so-called "blenders") who claim to have been injured in competing with respondents by the use of the word "Mills," and deny that any persons claiming to be so injured are their competitors, but allege on the contrary that the competitors who are objecting to the use of said word by respondents are individuals, firms, or corporations owning wheat-grinding mills, but also engaged in the manufacture and sale of self-rising flour in competition with respondents.

With respect to such competitors, respondents insist that they follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors, who are themselves

engaged in the same practices condemned by the complaint.

7. Respondents aver that their sales are made to customers who are familiar with their methods, and that none of their customers are in fact deceived or misled into thinking that they operate a wheat-grinding mill; and respondents aver that it would not be to their advantage if they did think so, because better self-rising flour can be made by the so-called "blender." The "miller" is to a large extent dependent on the local crop, but respondents can buy wherever the crop is best.

8. Respondents deny that they have represented, or led their customers or the public to believe, that middleman's profits are excluded, etc., as alleged in the complaint. This charge is a mere unwarranted inference or conclusion, without facts alleged to support it.

9. Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission after a full hearing, in October 1916 handed down an opinion, which remains of record, denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors.

10. Respondents for further defense submit that the complainant Federal Trade Commission, after **ex parte** investigation, has prejudged this case on questions of fact which are of vital, if not controlling importance, in that its authorized agent, acting in its behalf, has in writing stated that said Commission was of the opinion that respondents are not engaged in a manufacturing or milling process.

Respondents do not charge any bad faith, or intentional unfairness, on the part of the Commission, but submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law, in this proceeding.

And respondents further submit that if the Federal Trade Commission Act is to be construed as authorizing such procedure, such portion of said Act contravenes the Fifth Amendment to the Constitution of the United States, in that the Federal Trade Commission is not only undertaking to act at the same time as litigant and judge —which is contrary to the fundamental maxim that no man shall be a judge in his own case—but its findings of fact, although erroneous and contrary to the weight of the evidence, are conclusive if supported by any material evidence, and for this reason a full review of its action by an impartial tribunal is denied, and litigants are thereby deprived of their property without due process of law.

11. Respondents further aver that they have no wish, and have never had any wish or intention, to use unfair methods in competition, and have never used the word "Mills," or any other word mentioned in the complaint, with any intent to deceive or make false representations of any kind, being advised on the contrary that said word is truthful and fully authorized under the facts hereinbefore set out; and respondents submit that they should not be required to give up the trade name under which a valuable good will has been acquired; that this would inflict an unnecessary loss and hardship on respondents, and would in no wise benefit the public.

12. Respondents further state that they and other Nashville manufacturers of self-rising and processed flour supply a trade which is accustomed to buy in small quantities, and such service is an economic necessity in said territory, and is in the interest of dealers and of the consuming public, and enables consumers to obtain these products at a lower price than would be possible if such service were withdrawn or discontinued.

Respondents further aver that all self-rising and processed flour is of the same general type, whether manufactured by the so-called "millers" or the so-called "blenders," and that competition between them can only be determined, and is in fact determined, by three factors, to-wit, price, quality, and service. The grinding of flour in a particular mill is not, and cannot be, a factor.

Wherefore, respondents having fully answered, pray that said complainant be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 1012 Nashville Trust Building,
Nashville, Tennessee.

AMENDED COMPLAINT.

Acting in the public interest pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes." the Federal Trade Commission charges that E. C. Faircloth, Sr., E. C. Faircloth, Jr., F. B. Evers and the Estate of C. K Evers, hereinafter referred to as respondents, have been and are using unfair methods of competition in interstate commerce in violation of the provisions of Section 5 of said Act, and states its charges in that respect as follows:

Paragraph One: The respondents are members of a partnership which is engaged in the City of Nashville, State of Tennessee, in the business of purchasing various lots and grades of wheat flour from flour mills located in various States of the Middlewest, which they cause to be transported to their place of business in the City of Nashville and there blending and mixing the flours so purchased by them and putting up in sacks and offering for sale and selling the mixtures or blends resulting therefrom, in some cases adding leavening agents such as baking powder to the blends or mixtures producing the commodity known to the public and in the trade as "Self-Rising Flour" In the course of their business as aforesaid the respondents solicit orders for their products from dealer in various States other than Tennessee and contract to sell and deliver and do sell and cause to be transported to purchasers outside of the State of Tennessee their products as above described. Respondents in said business are in competition with individuals, partnerships and corporations likewise engaged in the business of selling wheat flour, either in plain or self-rising form, in interstate commerce who either manufacture the flour they sell by rolling or grinding or other process of crushing wheat and extracting therefrom the product known as flour, or purchase the flour they offer for sale, either as plain or self-rising, and do not in their trade names or otherwise in the conduct of their business use the terms "Mill," "Mills," "Millers," or "Milling," or otherwise represent that they are engaged in the manufacture of flour as above-described. Respondents in carrying on their business as aforesaid solicit orders and sell their products largely to retail grocers through the mail service.

Paragraph Two: Respondents also operate a plant for the conduct of the same character of business as above

described in the City of Birmingham, Alabama, and conduct the sale of their products at said plant under the names of Cherokee Mills and Alabama Flour Company.

Paragraph Three: Respondents in the course and conduct of their business as aforesaid operate under the name Cherokee Mills. Respondents solicit orders and sell their products under such name. On their letterheads and in their correspondence appears such statements as the following:

"Cherokee Mills
Capital $500,000
Quality Flours."

On the letterheads also appears a picture of extensive buildings with large advertising signs across them reading: "Cherokee Mills—High Grade Flour." In some of their form letters circulated in the course of their business as aforesaid respondents represent: "Daily Capacity 2000 barrels," "Tip-Top Finest Patent Plain Flour." In their letter and circulars soliciting orders respondents make other representations implying that they are manufacturers of flour as above described, that is, that they grind the wheat into the flour which they sell. Respondents' products are sold under a number of brands and are packed and delivered in cotton or other bags on which are stamped in conspicuous letters the name "Cherokee Mills" and such description as "Fancy Patent," "High Patent Flour," "Finest Patent," etc.

Paragraph Four: Respondents do not own or operate any mill or machinery, other than devices for blending or mixing lots and grades of flour purchased from millers as above described and adding leavening agents. They manufacture no flour by rolling or grinding or process of crushing wheat and extracting therefrom the product known as flour, and own or operate no mill or machinery fitted for that purpose.

Paragraph Five: The use by respondents of the name "Cherokee Mills" in their business and the representations in their business correspondence and otherwise as aforesaid have the capacity and tendency to lead dealers and prospective purchasers of plain or self-rising flours to believe that in purchasing their products they are buying direct from a miller or manufacturer of flour as above described and without the intervention of a middleman or any element of cost of a middleman's profit, and induce purchases of their flour by dealers and consumers on that understanding and belief; and said

representations constitute unfair method of competition with millers or manufacturers of flour likewise engaged in interstate commerce who make, as above described, the flour they offer for sale and with sellers of flour likewise engaged in interstate commerce who do not so manufacture but buy and sell flour made by others and do not represent themselves to be millers or manufacturers of flour, to the injury of said millers and sellers of flour in that said representations of respondents are false and misleading and tend to take away their business.

Wherefore, said acts and practices of respondents are all to the prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled, "An Act To Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

Wherefore the Premises Considered, the Federal Trade Commission on this 4th day of September, A. D. 1929, now here issues its amended complaint against the respondents.

NOTICE.

Notice is hereby given you, E. C. Faircloth, Sr., E. C. Faircloth, Jr., F. B. Evers and Estate of C. K. Evers, Co-partners doing business under the name Cherokee Mills, respondents herein, that the 4th day of October, A D., 1929, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you shall have the right under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violation of the law charged in the complaint.

You are notified and required on or before said date, to file with the Commission an answer to the complaint. If answer is filed appearance on that date will not be required and the hearing on the charges will be postponed to a later date, due notice of which will be given. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule III) provide as follows:

(1) In case of desire to contest the proceeding the respondent shall, within such time as the Commission shall allow (not less than 30 days from the service of the com-

plaint) file with the Commission an answer to the complaint. Such answer shall contain a short and simple statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegations of the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Commission.

(2) In case respondent desires to waive hearing on the charges set forth in the complaint and not to contest the proceeding, the answer may consist of a statement that respondent refrains from contesting the proceeding or that respondent consents that the Commission may make, enter, and serve upon respondent an order to cease and desist from the violations of the law alleged in the complaint, or that respondent admits all the allegations of the complaint to be true. Any such answer shall be deemed to be an admission of all the allegations of the complaint and to authorize the Commission to find such allegations to be true.

(3) Failure of the respondent to appear to file answer within the time as above provided for shall be deemed to be an admission of all allegations of the complaint and to authorize the Commission to find them to be true and to waive hearing on the charges set forth in the complaint.

In Witness Whereof, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 4th day of September, A. D. 1929.

By the Commission.

(Seal)

Otis B. Johnson,
Secretary.

ANSWER TO AMENDED COMPLAINT—Filed Oct. 3, 1929.

The Joint and Separate Answer of E. C. Faircloth, Jr., F. B. Evers, and Estate of C. K. Evers, to the Amended Complaint in this cause filed against them.

Respondents for answer say:

1. It is admitted that there is a partnership doing business in Nashville, Tennessee, under the name and style of Cherokee Mills. This business was started in 1910, under the name of Cherokee Mills, by E. C. Faircloth, Sr., and C. K. Evers, both of whom are now dead. Said business has been carried on since said date, the present members of the partnership being Estate of E. C. Faircloth, Sr., Estate of C. K. Evers, E. C. Faircloth, Jr., F. W. Faircloth, and F. B. Evers.

It is admitted that said partnership has been and is engaged in the manufacture of self-rising and processed flour, but it is denied that said business and the process of manufacturing said products are correctly described in the complaint.

In addition to the manufacture of self-rising and processed flour, said partnership since 1925 has owned and operated a grinding plant for the manufacture of stock feed.

2. It is admitted that respondents contract to sell, and sell and deliver their products outside the State of Tennessee.

3. Respondents admit that they are in competition with others, in making and distributing said products, but they are without knowledge as to whether said competitors are individuals, partnerships, or corporations, or as to whether they are engaged in Interstate Commerce, or as to whether they manufacture the flour sold by grinding or crushing wheat, or as to whether they purchase the flour they offer for sale, or do not, in their trade names, or otherwise, use the term "Mill," "Miller," or "Milling," or otherwise represent that they are engaged in the manufacture of flour, etc., as alleged in the complaint.

4. Respondents deny that they solicit orders and sell their products principally to retail grocers through the mail service.

5. Respondents deny that those of their competitors who are so-called "millers" grind all the self-rising flour which they sell in competition with respondents, and on the contrary aver that said competitors, to a greater or less extent, buy flour from others, which they make

into self-rising flour by the same methods used by respondents, and put out this product in their own bags, and under their own brands; and respondents aver that the same is true with respect to "processed" flour.

6. Respondents admit that they operate a plant of the same character in the City of Birmingham, Alabama, and conduct the sale of their products at said plant under the names of "Cherokee Mills" and "Alabama Flour Company."

7. Respondents deny that the letter-heads, bags, and advertising matter, and statements herein appearing, are correctly described in the complaint.

8. Respondents admit that the words "Mills" and "Milling" are used by them in connection with letter-heads, advertising matter, and bags in the conduct of their business, but respondents, although entitled to so describe themselves, do not in fact use the term "Manufacturers."

9. Respondents deny that in their letters and circulars soliciting orders they make use of representations implying that they are grinders of wheat.

10. Respondents deny that they own or operate no mill or machinery other than certain mixing devices, etc., and aver that they own machinery adapted to the manufacture of self-rising and processed flour, which is both a milling and manufacturing operation, and also machinery adapted to the grinding and manufacturing operation, and also machinery adapted to the grinding and manufacture of stock feed, the value of respondents' plants being approximately $....., and of their machinery and equipment approximately $....., and of their investment, capital, etc., approximately $..... .....; or a total investment of approximately $..... ..... Respondents' Nashville plant has a capacity of about ..... barrels a day, on a twenty-four-hour basis, and their Birmingham, Alabama, plant has approximately a capacity of ..... barrels. In 1928 respondents did a business of approximately $.....

It is true that respondents grind no wheat or other cereals adapted for human consumption, but it is also true that respondents operate a grinding mill for the manufacture of feed for cattle, as hereinbefore set out.

11. Respondents deny that the use of the aforesaid trade names with the words "Mills" or "Milling," separately or in combination with the term "Manufacturer," or any other statements on respondent's letter-heads, bags, etc., has any tendency to make dealers or prospec-

tive customers or consumers believe that they are buying flour from a miller and manufacturer without a middleman's profits, etc., as claimed in the complaint.

12. Respondents deny that any false representations are thereby made, and deny that these alleged practices, if proven, constitute any unfair competition with millers and makers of self-rising flour, or processed flour, alleged to be likewise engaged in Interstate Commerce, etc.

13. Respondents deny that said alleged actions have the effect of taking away business improperly from said alleged competitors, and on the contrary aver that said conduct, if proven, could have no such possible effect:

(a) Because the so-called "Millers" do not and cannot make self-rising flour with their grinding mills, but must first obtain raw flour, either by grinding it, or by purchasing the same, and then turn it into self-rising flour.

(b) Because said "Millers" obtain no advantage from making self-rising flour from the flour which they grind, but are rather at a disadvantage, both as to cost of production of the raw flour, and as to its quality, as will be shown at the hearing.

(c) Because self-rising and processed flour, no matter by whom made or sold, is essentially the same product destined for consumption in a particular region, and the buyers of such flour are governed by only three factors, to-wit; price, quality, and service.

(d) Because there is no pretense in the complaint that self-rising or processed flour made by the so-called "miller" is any better than that manufactured by the so-called "blender," and there is no deception of the public by substituting an inferior for a superior article.

14. Respondents aver that those of their competitors who are "Millers" follow the same practices characterized in the complaint as "unfair," in that they buy flour, turn it into self-rising or processed flour by the manufacturing process hereinbefore mentioned, and put it out under their own brands and in their own bags.

Respondents are advised that the Federal Trade Commission has no duty or power to act in the interest and for the protection of competitors who are themselves engaged, as against respondents, in the same practices condemned by the complaint.

15. Respondents deny, as hereinbefore set out, that the use of the words "Mills," "Milling," or "Manufacturer," misleads, or has a tendency to mislead, any substantial portion of the purchasing or consuming public,

in that they may be led to believe they are buying from one who grinds his wheat. As hereinbefore set out, respondents some six years ago installed grinding machinery for the manufacture of feed stuffs, which is now a considerable percentage of their business, and with respect to this product they feel that there can be no doubt of their right to use the name "Cherokee Mills."

As to other flour products, while believing and insisting that they are both "Millers" and "Manufacturers," respondents are nevertheless willing to mark on every bag, in conspicuous lettering, the words "Packed by" Cherokee Mills. Respondents have heretofore made said offer, and hereby repeat it, being willing to cut off all possibility of deceiving or misleading any purchaser or customers through the use of the words "Mills", "Milling," etc. Respondents do not claim to be grinders of wheat, and do not wish to hold themselves out as such, and believe that by the terms of their offer any possibility of misleading on the part of customers or consumers would be cut off.

16. Respondents, under the trade names aforesaid, have acquired a valuable good will, and they insist that it would be unjust and inequitable to deprive them of this.

Respondents aver that in 1916 certain interested persons, operating wheat-grinding mills and manufacturing self-rising flour, in competition with the Nashville manufacturers of self-rising flour, instituted proceedings before the Interstate Commerce Commission to take away the "milling in transit" privilege enjoyed by such Nashville manufacturers, insisting that they were not engaged in a "milling" operation.

The Interstate Commerce Commission, after a full hearing, October, 1916, handed down an opinion, which remains of record, refusing and denying the contentions of the so-called "millers," and upholding the "milling in transit" privileges of said Nashville manufacturers.

Respondents submit that after this decision by another Federal Tribunal that makers of self-rising flour were engaged in a "milling" and "manufacturing" process, and in view of the lapse of time since said decision, it would be unjust and inequitable to sustain the present proceeding in the interest of these same competitors, thereby depriving respondents of the valuable good will which they have built up.

17. Respondents deny that this proceeding is in the interest of the public, as claimed in the complaint, and al-

lege on the contrary that said proceeding is actually (though not intentionally) in the interest of a few private individuals, competitors of the so-called "blenders," and that its tendency and effect, if sustained, will be to injure and exploit the consuming public for the benefit of private individuals. Respondents insist that the practices described in the complaint do not substantially tend to affect the public to its injury; deny that this proceeding falls within or is covered by the Act of Congress creating the Federal Trade Commission; and deny that the complainant, Federal Trade Commission, has jurisdiction of this proceeding.

18. Respondents submit that Section 5 of the Federal Trade Commission Act, and the procedure thereunder, violate the Fifth Amendment to the Constitution of the United States, in that said Federal Trade Commission is not and cannot be impartial, since it acts both as plaintiff and judge in the same proceeding, and because its findings, however erroneous, and however opposed to the weight of evidence, are binding and conclusive on review if supported by any material evidence, and thus a full review by an impartial tribunal is denied, and the litigants before said Commission are thereby deprived of due process of law.

Respondents further submit that the Complainant, Federal Trade Commission, after ex parte investigation, has prejudged this case on questions of fact, which are of vital, if not controlling importance.

Respondents do not charge any bad faith, or intentional unfairness, on the part of the Commission, but submit that such procedure is in contravention of the Fifth Amendment to the Constitution of the United States, and that these respondents are thereby denied due process of law in this proceeding.

And now having fully answered, respondents pray that said complaint be dismissed.

Thomas H. Malone,
Counsel for Respondents,
Suite 10, 12 Nashville
Trust Building,
Nashville, Tennessee.

United States of America

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 19th day of October, A. D., 1929.

Commissioners:
Edgar A. McCulloch, Chairman,
Garland S. Ferguson, Jr.,
C. W. Hunt,
William E. Humphrey,
Charles H. March.

In the Matters of	
Royal Milling Co., et al.,	Docket No. 1597
Tennessee Grain Co.,	Docket No. 1598
Nashville Roller Mills,	Docket No. 1599
Snell Milling Co.,	Docket No. 1600
Watauga Milling Co., et al.,	Docket No. 1601
State Milling Co., et al.,	Docket No. 1602
Cherokee Mills., et al.	Docket No. 1604

ORDER.

The above-entitled matters coming on for consideration by the Commission on the suggested solutions of the issues raised in the complaints filed July 12, 1929 by Thomas H. Malone, counsel for respondents, and the Commission now being fully advised in the premises,

It Is Ordered that said suggested solutions be considered at that time of final argument on the merits.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

STIPULATION OF COUNSEL.

In the above styled matter it is stipulated and agreed between Baldwin B. Bane, Esq., counsel for Federal Trade Commission, and Thomas H. Malone, Esq., counsel for respondents, and subject to the approval of the Federal Trade Commission:

I. That all evidence taken in the case of Francis J. McCarthy, doing business under the names of Watauga Milling Company, etc., (Docket No. 1601), may be considered as part of the evidence herein.

II. That the matters hereinafter covered by further stipulation in this cause may be considered in said cause of Francis J. McCarthy, doing business, etc., (Docket No. 1601), so far as they may be material to the general issues raised by the pleadings.

III. That in addition to the evidence in said cause (Docket No. 1601 the following additional facts are stipulated with reference to this cause:

1. That said business was begun under the name of "Cherokee Mills," in Nashville, Tennessee, in 1910, by E. C. Faircloth, Sr., and C. K. Evers, both of whom are now dead; that the present members of said partnership are Estate of E. C. Faircloth, Sr., Estate of C. K. Evers, E. C. Faircloth, Jr., F. W. Faircloth, and F. B. Evers. E. C. Faircloth, Sr., died March 13, 1929.

2. That said partnership conducts its business in a plant in Nashville, Tennessee, and also a branch in Birmingham, Alabama, which also operates under the name "Cherokee Mills." This Birmingham branch was established in the year 1922.

3. That said partnership is engaged in making "self-rising" flour, and also what is described in the testimony of respondent Francis J. McCarthy (Docket No. 1601), as "processed " flour—said operations being conducted along the same line and by machinery of the same type as that employed and used by the respondent Francis J. McCarthy.

4. That said partnership, in addition to the operations described in the foregoing paragraph, is also engaged in making mixed feed for cattle or other animals, and not for human consumption. That said "mixed feed" is produced by the grinding of wheat, corn, together with other elements, such as hay, alfalfa, etc. The making of this "mixed feed" is carried on by separate and different machinery from that used in the production of "self-rising" and "processed" flour, the feed

manufacturing unit and the grinding machinery therefor being a separate part of the general plant.

5. That exhibit 21 of this stipulation shows the exterior view of the Nashville plant, and exhibit 22 the exterior view of the Birmingham plant. That exhibits 23, 24 and 25 show interior views of the Nashville plant. That exhibit 26 shows an interior view of the Birmingham plant. That exhibit 27 shows the grinding machinery of the feed manufacturing unit of the Nashville plant, and exhibit 28 shows the packing and mixing machinery of said "mixed feed" unit.

6. That exhibits 1 to 13 inclusive show letters written by the Cherokee Mills, and sent out to customers, or prospective customers, under the dates shown by the respective exhibits.

7. That exhibits 14 to 20 inclusive, to this stipulation, shows the bags, or sacks, brands, etc., used by said "Cherokee Mills" in carrying on its flour business.

8. That said partnership also markets certain brands of flour produced in its Nashville plant under the trade name "Tennessee Flour Company."

9. That the brands put out by said partnership from the "Cherokee Mills" are as follows:

"Tip-top," described as "Finest Patent Flour."
"Tip-top"—"Superlative Self-rising Flour."
"Welcome"—"Superlative Self-rising."
"Cherokee Chief"—"High Patent Plain."
"Reddy-to-Bake"—"High grade Self-rising."
"Blue Diamond"—"Choice Patent Plain."
"Blue Bonnet"—"Finest Self-rising."

10. That the brands put out under the trade name "Tennessee Flour Company" are as follows:

"Challenge"—"Fancy Patent Plain Flour."
"Banner"—"Straight Grade Plain Flour."
"Reddy-to-Bake"—"Choice Patent Self-rising."
"Ditto"—"A repeater Self-rising."

11. That said partnership, in carrying on its business, buys and sells in Interstate Commerce.

12. That of the flour which goes through the processes already described in its plant, and is afterwards sold to the trade, approximately 60% is "self-rising," and approximately 40% is "processed."

13. That said partnership travels approximately fifteen salesmen, and solicits orders from and sells its prod-

ucts almost exclusively to retail merchants. This solicitation is accomplished both through the traveling salesmen and by mail. Business is not solicited from wholesalers.

14. That the total sales made by said partnership in the year 1929, from the plant in Nashville and the branch in Birmingham, together amounted to $1,189,998.92.

15. That the book value of the plant (in Nashville and Birmingham together) amounts to $118,451.00, and the replacement value amounts to $250,000.00. That the "mixed feed" unit of the Nashville plant has been in operation for six years, and that about 12½% of the total business is "mixed feed."

16. That on the ——— day of February, 1929, a letter was written to said partnership on the stationery of the Federal Trade Commission, signed by Web Woodfill, Chief Trial Examiner, enclosing a copy of a proposed stipulation—said letter and stipulation being in all respects similar to the documents, respondents' exhibits for identification 71 and 72 in Docket No. 1601. The objections, ruling of the Examiner, and exceptions made with reference to the offer of respondents' exhibit for identification 71 and 72 in Docket 1601, R. p. 1066, et seq, are to apply also in this cause.

17. That a proposed solution of the controversy between these respondents and the Commission was offered under date of July 12, 1929,—said proposed solution and the Commission's reservation of action thereon being as shown in the testimony of the witness, Vernon S. Tupper, in Docket No. 1601, pages 1071 and 1072 of the record in said cause.

IV. That the Federal Trade Commission wrote these respondents, and also the respondents in Docket 1597 (Royal Milling Company), Docket 1598 (Tennessee Grain Co. and Tennessee Milling Co.), Docket 1599 (Nashville Roller Mills), Docket 1600 (Snell Milling Co.), Docket 1601 (Watauga Milling Co.), Docket 1602 (State Milling Co.), Docket 1607 (Old Hickory Mills), Docket 1617 (Southern Milling Co.), and also Mero Mills, (which, it is stipulated, is the same Mero Mills mentioned in the testimony of the witness Thomas E. Snell in Docket 1601 at pages 934, et seq, of the record), a letter similar in form to respondents' exhibit 68, as shown in the testimony of the witness Vernon S. Tupper in Docket No. 1601, at page 1039 of the record, requesting from each a list of twenty-five customers; that nine of the above named concerns complied with said request; and that from the names so furnished the Federal Trade Commission obtained the

twenty-five merchants or dealers, who were examined in chief on behalf of the Commission in said cause, Docket No. 1601, with the exception of the following two witnesses—Walter Cunningham and C. S. Ragland.

V. That to prevent the expense, delay and trouble incident to a separate trial of this cause, the same may be heard and determined by the Commission in connection with said cause of Francis J. McCarthy, doing business, etc., Docket No. 1601,—it being agreed that the evidence introduced in said cause (Docket No. 1601) may be looked to by either party as if taken in this cause, and with respect to these respondents, except in so far as changed by this sipulation, and that the record therein shall consitute part of this record.

Thomas H. Malone,
for Respondents.
Baldwin B. Bane.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioner:

C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of E. C. Faircloth, Sr., E. C. Faircloth, Jr., F. B. Evers and Estate of C. K. Evers co-partners doing business under the name Cherokee Mills, and individually.	Docket No. 1604

FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of an Act of Congress approved September 26, 1914 (38 Stat. 717), the Federal Trade Commission issued and served an amended complaint upon the respondents above named charging them with the use of unfair methods of competition in commerce in violation of the provisions of said Act.

The respondents having entered their appearances and having filed their answer herein, a stipulation as to the facts was entered into between counsel for the respondents and counsel for the Commission in which it was stipulated and agreed that the Federal Trade Commission should take such stipulation as to the facts in lieu of testimony.

Thereupon this proceeding came on for decision by the Commission on the briefs submitted by counsel for the Commission and counsel for the respondents and argument by counsel for the Commission and counsel for the respondents, and the Commission having duly considered the record and being fully advised in the premises makes this its findings as to the facts and conclusion drawn therefrom:

Findings as to the Facts and Conclusion

Paragraph One: Respondents, E. C. Faircloth, Jr., F. B. Evers, Estate of C. K. Evers and Estate of E. C. Faircloth, Sr., are members of a partnership which conducts business under the names Cherokee Mills and Tennessee Flour Company. The business of this partnership was begun under the name of Cherokee Mills in 1910 by E. C. Faircloth Sr. and C. K. Evers. E. C. Faircloth Sr. died March 13, 1929. Respondents' principal place of business is located in Nashville, Tennessee but they also operate a branch in Birmingham, Alabama which was established in 1922. Respondents are engaged in the business of buying flour from concerns that grind wheat into flour and then mixing such flours, in some instances adding phosphate and in other instances adding salt, soda, and phosphate, which makes the flour ready for use without the addition of baking powder, and thus gives to it the name of self-rising flour. They then pack the flour in bags under brands of their respective names and sell it to dealers located in various states of the United States, but particularly in the Southeastern States. Respondents buy flour from concerns grinding wheat into flour and located at various points throughout the United States. This flour is shipped to them at Nashville, Tennessee or Birmingham, Alabama, from which points they ship the flour to their customers. In the course and conduct of their aforesaid business respondents are in competition with other co-partnerships, corporations and individuals engaged in the sale of flour in interstate commerce. In addition to the above described business respondents on a much smaller scale and in a much smaller way are also engaged in making a mixed feed for cattle or other animals but not for human consumption. Respondents produce this mixed feed by the grinding together of wheat, corn, hay, alfalfa, etc. The making of this mixed feed is carried on by separate and different machinery from that used in the mixing of the flour, the unit for the making of this mixed feed being a separate part of the general plant. This mixed feed unit of the Nashville plant has been in operation for about six years.

Paragraph Two: Respondents put the flour which they buy from concerns located at various points throughout the United States in what is called a batch mixer, where it is stirred up and mixed together. Usually but not always two or more flours are so mixed or stirred up together. If the flour is to be self-rising there is added in this mixer the correct proportions of salt, soda and phosphate. If it is not to be self-rising a little phosphate

is added in the mixer. The flour is then run from this batch mixer into bins, from which it goes to a draver feeder which feeds the flour into elevator cups, which carry it to the reel or sifter, from whence it goes after being sifted into hopper bins, and thence to the packer where it is packed into bags of the desired sizes. There is no grinding process in the operation. Respondents sell from 4 to 7 brands of flour under each of the names they use, but each brand does not represent a different grade or quality of flour. It takes from 10 to 15 minutes to run the flour through the equipment used by respondents. The cost of the machinery in such a plant as the respondents', having a capacity of 3,000 barrels a day on a 24 hour run, is approximately $20,000 to $25,000, and the total investment approximately $150,000 to $200,000. The replacement value of respondents' plants is approximately $250,000.

Paragraph Three: The grinding of wheat into flour has developed by various steps until today it has become a refined, complex, and scientific process. Roughly, the operations which constitute the process are: (1) cleaning and otherwise preparing the grain for grinding; (2) the grinding or reduction of the grain; (3) the bolting or sifting operation; (4) purification and preparation of the product by blowing air through it, adding phosphate, bleaching agents, etc. The modern method of grinding wheat substitutes for the single grinding between millstones a succession of grindings between several sets of iron or porcelain rollers. The wheat when received at the mill is unloaded into elevators or bins, and is thoroughly screened and dry cleaned and scoured by machines especially adapted for that purpose. This process itself is quite complicated, requiring a great deal of machinery. The wheat is analyzed and graded and then tempered and conditioned, preparatory to being ground. It is then passed through the rollers, each passage through a pair of rollers being called a break, and different concerns using different numbers of breaks. After each break the product is sifted or bolted, and the results of the siftings go into various streams, which are carried to other sets of rollers where they are again crushed or broken, the process being a continuous operation. A five break mill has eighteen spans of rolls and thirty-two separations. Each break effects a mechanical separation. The bolting or sifting separates the results of the breaks into various streams and products, such as flour, middlings, offals, bran, shorts, etc. The bolting or

sifting machine is commonly referred to as a reel. After the flour has gone through the rolls it is again bolted or sifted, and then sent to the packing room. The flour is milled to definite standards in order to insure uniformity. The wheats for the various brands of flour made by the mill are selected by the chemist and the superintendent from reports which are on file in the superintendent's and chemist's offices, showing the characteristics and chemical constituents of the wheats. Concerns grinding wheat into flour are known as "Manufacturers of Flour." Bolting or sifting has been done by the concerns grinding the wheat into flour in this country from the earliest times. The number of boltings or siftings differs in different mills, and is of importance in determining the appearance of the flour. Bolting or sifting is but a part of the process of preparing the flour. Concerns grinding wheat into flour bleach the flour, the bleaching agent being added on the mill stream. This bleaching matures or ages the flour, thus improving its baking qualities, and whitens it. Concerns grinding wheat into flour blend flours by a blending of the wheats after a chemical analysis of such wheats, and by blending the various streams of flour produced by the different breakings of the wheat berry between the various rolls in the mill. Concerns grinding wheat into flour maintain a laboratory and an experimental mill in charge of a chemist, in which the wheats and flours are analyzed and tested in order to determine their various characteristics, such as gluten content, protein content, moisture content, ash content, etc., in order to keep each of the brands of flour put out by such concerns uniform. It is only from chemical tests that such contents of the flour can be determined and the uniformity of each brand maintained. These characteristics determine the grade and quality of the flour. Unless these characteristics of the flour are maintained practically uniform in each brand of flour, the flour cannot be kept up to one standard. Concerns grinding wheat into flour are very jealous of their grades and brands, and guard and protect them with great care. All mills in the process of grinding the wheat and preparing the flour make or produce several grades of flour. These are, in the order of the best and highest priced grades; patent flour, which means that part of the stream of flour which is left after taking off a greater or less percent of the inferior flour—it is the best flour made by the mill; straight flour, which means one hundred percent flour, all the flour that is extracted from the wheat berry; clear

flour is the flour taken off by the mill after the patent flour has been removed; low grade flour designates all of the lowest grades made by the particular mill. These terms indicate with different mills' flours of widely different qualities. The cost of the machinery for a concern grinding wheat into flour with a capacity of about 3,000 barrels a day is about $600,000, and the total investment between $1,000,000 and $1,500,000. The time required for preparing the wheat and producing the flour by such a concern is from eight hours to fifty or sixty hours, due to differences in time required for tempering the wheat. But if the tempering time is excluded, the time required is from a half hour to one and a half hours, depending upon the number of breaks and boltings used by the concern.

Paragraph Four: Practically all concerns grinding wheat into flour add phosphate to the flour on the mill stream, that is, as the flour is run through the mill. This addition is for the purpose of whitening the baked product and counteracting an overdose of soda. Self-rising flour is flour to which there has been added in correct proportions salt, soda, and phosphate, so that the flour is ready for use without the addition of baking powder by the cook. It is particularly adapted to the making of biscuits. A formula for mixing self-rising flour was discovered by Professor Liebig about seventy-five years ago. The self-rising flour business was originated or begun in Nashville, Tennessee, by a Dr. Owsley. He operated under the name Owsley Flour Company and sold through the Southeastern States. This company was succeeded by the Ford Flour Company about 1897, which concern is still in existence and selling self-rising and plain or phosphated flour throughout the South. The concerns originating the mixing of self-rising flour in Nashville and not grinding wheat into flour did not call themselves mills or milling companies, or manufacturers of flour. Most of those actually grinding wheat into flour and selling in the Southeastern States mix and sell self-rising flour, and such is usually produced directly from the mill stream—that is, by running the mill stream directly into mixers where the self-rising ingredients are added before the flour is finally bolted and packed. Respondents sell in competition with those actually grinding wheat into flour, and in competition with those engaged in the same character of business as respondents and who do not represent themselves as mills or milling companies, or manufacturers of flour.

Findings as to the Facts and Conclusion

Paragraph Five: Nashville, Tennessee, is the center of the flour industry in the South. There are several concerns located there grinding wheat into flour, and other concerns used to be located there that ground wheat into flour. There are approximately 170 concerns actually grinding wheat into flour and selling in the Southeastern territory.

Paragraph Six: Respondents do not have or maintain a laboratory for testing or analyzing the flours which they buy or sell. They use regularly only the so-called paddle test, which consists in simply putting the flour on a paddle and looking at it. By this test the characteristics or qualities of the flours, such as gluten content, protein content, moisture content, starch content, etc., cannot be determined. Only the relative appearance of the two flours can be gotten from such a test, and this is of little value in approximating even the grade of the flour, because practically all concerns grinding wheat into flour add phosphate and a bleaching agent to the flour on the mill stream. Different concerns add different amounts of such, and a greater amount of bleaching makes a lower grade of flour appear better. Practically no two concerns grinding wheat into flour grind exactly alike. Some granulate the flour finer than others, and some add a larger proportion of the total break of the wheat berry to their various grades of flour than do others. A difference in the granulation of the flour and in the amount of the total break of the wheat berry contained in the flour affects very materially the appearance of the flour. The quality and characteristics of the flour cannot be determined by the paddle test, and respondents by this test cannot maintain uniformity of brands or grades. The grade and quality of all flours are determined by their chemical analysis. The quality or grade of the flour is not changed by mixing self-rising ingredients with it and running it through the equipment in respondents' plant. From time immemorial there have been plants buying and blending flour but not grinding wheat into flour, which plants were known as blending plants and not called or known as mills or milling companies, or manufacturers of flour. Such terms have from time immemorial been applied in the flour trade only to the grinding of the grain.

Paragraph Seven: Respondents represent themselves as "Cherokee Mills. Quality Flour. Daily Capacity 2,000 barrels;" "The Tennessee Flour Company. Quality Flours. Daily Capacity 1,000 barrels." In the letters,

circulars and literature which respondents circulate among the trade in their efforts to sell flour they make such statements as the following:

> "In the Southwest the growing wheat is coming along nicely and they have prospects of the biggest yield in recent years but this is offset by late planting and consequent lowered conditions to the north, and the Southwest crop is entering now upon a period that is most dangerous to its welfare, and being perfect at the present, its future course, if it changes at all, must be downward.
>
> "As to the soft red wheat there is little to be had and while we favor the market for May only, it may be that wheat will grow steadily stronger until the new crop is harvested, which will be some time in July."

And:

> "The wheat market during the past week having remained practically stationary we are not making a change in our flour prices today, but we continue to lean to the belief that an advance of considerable proportion will take place during this month of May, and that you are absolutely safe in buying your flour requirements as far ahead as June 1st."

And:

> "Wheat is up still more since we quoted you last Saturday, and we note that a number of mills have still further advanced their flour prices, but we propose to stick to our present levels just as long as we possibly can. However, at the rate we are shipping out 'Tip-Top' and our other brands our stocks will speedily diminish. One of the largest millers in the United States was in our office today, and in talking of general conditions the writer asked him his opinion on the soft red wheat for the remainder of this crop, and we are pleased to say that his idea coincided with ours in that he looks for another 10c per bushel at least between now and June, which would be in round numbers 50c per barrel on flour above our present price."

And:

> "Please remember that in our flours you are getting an entirely soft red wheat article, perfectly uni-

form and absolutely guaranteed, and again we caution you to look out for the numerous brands being shipped into the Southeast that are milled from hybrid wheats, and which will not give satisfaction to housewives accustomed to soft flour."

And:

"We have not been, nor will we be from present indications, friendly to stronger prices on wheat as a whole, but we do believe that soft red wheat is good property, and will be at any time during the remainder of this crop year. We have accumulated considerable supplies and are able to offer entirely soft red flour in all our grades, and the prices that we quote do not nearly reflect replacement costs."

And:

"Soft wheat continues to climb, and even at the price it is bringing now there is little to be had. We therefore consider ourselves fortunate indeed in that we have protected our requirements for the spring months and can guarantee delivery of an entirely soft wheat flour in all our grades.

"There are a number of flours being offered to the southern trade at this time that are made entirely from semi-hard or low protein wheat, and while these can be had at a considerably discount we doubt that it is wise to buy them for they will not give satisfaction where housewives are accustomed to soft red wheat flour."

Paragraph Eight: The containers for respondents' flour have on them the name under which they are selling the particular flour such as "Cherokee Mills." In addition there appears upon the containers for the flour the brand name and a designation of the type of the flour such as "Tip-Top. Finest Patent Flour," "Tip-Top. Superlative Self-Rising Flour," "Cherokee Chief. High Patent Flour," "Blue Bonnet. Fancy Self-Rising Flour," "Ready To Bake. Self-Rising Flour." There is no such term as "process flour" or "processed flour" in the flour or milling industry. Such terms have no significance in the trade. Neither the word "process" nor the word "processed" appears anywhere on any of respondents' bags, labels, or containers, or in any of their literature as descriptive of any of their flour. The term "process flour" or "processed flour" could only mean flour handled twice, run through the mixing machines

and packed in sizes suitable for the family trade, or a low grade or off grade flour that has been mixed with good flour to bring the grade up to a suitable standard.

Paragraph Nine: When the term "mills" or "milling company," or "manufacturer of flour" is used in the flour industry it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour. When either of such is used in the name of or in connection with the name of the concern that is on the container in which the flour is sold, it indicates to dealers and consumers that the flour contained in the package was ground from wheat by the concern whose name appears upon the package. And many dealers and consumers prefer to buy flour that comes directly from a concern that ground the wheat into flour rather than from one that bought the flour from a grinding concern, mixed it and packed it and then resold it, because they think that they get from such grinding concern more uniform product or get a better product for less money because of the elimination of a middleman's profit or costs. Many persons, dealers and consumers, have been buying respondents' flour believing them to be, because of the use of such words or terms in the names under which they do business and because of their representation that they are manufacturers of flour, a concern grinding wheat into flour. The crushing of wheat into flour is one of the oldest of human occupations. The act of crushing the grain into flour has always been known as milling, and the concern performing such act as a "mill," "miller" and "milling company," and this is still the significance of such terms to a large part of the trade and the consuming public. Respondents' use of such words or terms in the names under which they do business and their representation that they are manufacturers of flour tend to and do divert trade to respondents from concerns actually grinding wheat into flour and selling in the States in the Southeastern section of the United States, and from concerns engaged in the same character of business as respondents and selling in the said section of the United States, but that do not use such words or terms in the names under which they do business or represent that they are manufacturers of flour.

CONCLUSION.

The practices of respondents under the conditions and circumstances set forth in the foregoing findings of fact are to the prejudice of the public and respondents' competitors, and are unfair methods of competition in commerce and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes."

By the Commission:

C. W. Hunt,
Chairman.

(Seal)

Dated this 16th day of April, A. D., 1931.

Attest:

Otis B. Johnson,
Secretary.

United States of America

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 16th day of April, A. D., 1931.

Commissioner:

C. W. Hunt, Chairman,
William E. Humphrey,
Charles H. March,
Edgar A. McCulloch,
Garland S. Ferguson, Jr.

In the Matter of E. C. Faircloth, Sr., E. C. Faircloth, Jr., F. B. Evers and Estate of C. K. Evers co-partners doing business under the name Cherokee Mills, and individually.	Docket No. 1604

ORDER TO CEASE AND DESIST.

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the answer of respondents thereto, stipulation between counsel and briefs and arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that respondents have been and are using unfair methods of competition in commerce in violation of the provisions of Section 5 of an Act of Congress approved September 26, 1914, entitled, "An Act To create a Federal Trade Commission, to define its power and duties, and for other purposes,"

It Is Now Ordered that the respondents, E. C. Faircloth, Jr., F. B. Evers, estate of C. K. Evers and estate of E. C. Faircloth Sr. co-partners and individually, their representatives, agents and employees and the representatives, agents and employees of each of them, do cease and desist from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or any other name which includes the word "Mills" or word or words of like import, and from making representations through

advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such word or words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill where it is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such name or title, or by or through any such representations.

It Is Further Ordered, that the respondents above named within sixty (60) days from the notice hereof file with the Commission a report in writing setting forth in detail the manner in which this order has been complied with and conformed to.

By the Commission.

Otis B. Johnson,
Secretary.

(Seal)

In United States Circuit Court of Appeals, Sixth Circuit

Nos. 5958, 6098, 6099, 6100, 6101, 6102

ROYAL MILLING CO. ET AL., PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

Petitions to review orders of the Federal Trade Commission

Decided May 4, 1932

[File endorsement omitted.]

Before MOORMAN, HICKENLOOPER, and SIMONS, Circuit Judges

Opinion

Filed May 4, 1932

SIMONS, Circuit Judge: Nashville, Tennessee, if not the center of e flour industry in the South, is at least the largest center of the lf-rising flour industry in the South, if not in the world. The x petitioners are all located in Nashville; they sell self-rising flour roughout the south-eastern States, in interstate commerce, and have ilt up a substantial industry. If not originators of the process of ixing self-rising flour, nor even its first producers, they were un-ubtedly early in the field, and in some respects pioneers in the in-stry, one of the petitioners having commenced business in 1902, d the others at dates from 1905 to 1925.

Self-rising flour is used extensively throughout the South in mak-g griddle cakes, biscuits, and other hot breads, and consists of flour th salt, soda and phosphate added in proper proportions and operly mixed. The petitioners buy their flour from grinding mills, t are not themselves grinders of wheat into flour. They also rket a commodity called "processed flour." This is a blend of two or more flours of different content with a small percentage of phosphate. Processed flour tends to counteract an overdose of soda in the hands of an unskilled housewife, and restores some extent the mineral content of flour removed in the grinding ocess.

All of the petitioners in their corporate or partnership names use e words "Mill" or "Milling." They also represent themselves manufacturers. Considerable machinery is required for the mak-g of self-rising and processed flour. Mills that grind wheat into ur and sell in the southeastern States also produce self-rising flour.

The process used by the grinding mills is substantially the same as that of the petitioners, and requires substantially the same machinery and the same amount of time. The petitioners' product, and that of the the grinding mills, are in active competition in the territory. There is also evidence that petitioners' product for some time came into competition with the product of one or two concerns in the same business which did not represent themselves as mills or milling companies. This competition, however, was never substantial, and it is doubtful on the record whether it still exists. Most of the petitioners were in the self-rising flour industry before the grinding mills undertook to produce the commodity, although one or two of the petitioners may have begun their enterprises later. Upon occasions some of the grinding mills buy surplus flour from other grinding mills, and when this is done the purchasers sell the flour under their own labels.

Early in the proceedings the petitioners offered by letter, and again in their amended answers, to add the phrase "Not grinders of wheat" to their trade or corporate names wherever used, to "cut off the possibility of deceiving or misleading any purchaser or customer." No attention was paid to the offer, and after a hearing in one of the cases, and a stipulation adopting the evidence in that case to all of the other cases, the several orders here reviewed were made by the commission, directing the several petitioners to desist from using the words "Mill" or "Milling" in their corporate or trade names, and to cease from making representations that they are manufacturers of flour, or that the flour sold by them comes direct from manufacturer to purchaser.

The proceedings which led to the orders here complained of were begun by the respondent under the provisions of section 5 of the Trade Commission act. The meaning of the act, its purpose, the extent of the power conferred by it upon the Federal Trade Commission and its supplementary relationship to the Sherman
190 Anti-trust Act and the Clayton Act, have frequently been considered by this court. (L. B. Silver Company v. Federal Trade Commission, 289 Fed. 985; Procter & Gamble Company v. Federal Trade Commission, 11 Fed. (2d) 47; Berkey & Gay Furniture Company v. Commission, 42 Fed. (2d) 427; Raladam Company v. Commission, 42 Fed. (2d) 430; Ohio Leather Company v. Commission, 45 Fed. (2d) 39; Federal Trade Commission v. Good-Grape Company, 45 Fed. (2d) 70.) The issues here presented do not, in our opinion, require, nor does their novelty now invite the careful study there pursued, nor the painstaking argument there presented. It is settled that a complaint may be filed by the commission, interstate commerce being involved, only if it shall appear among other things that a proceeding would be to the interest of the public, that the public interest must be specific and substantial, that this requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even

that they have been deceived. (Federal Trade Commission v. Klesner, 280 U. S. 19; Federal Trade Commission v. Roladam Company, 283 U. S. 643.)

It is clear from the Klesner case that public interest in an unfair practice may be said to exist only when a substantial part of the purchasing public is injuriously affected by it or has suffered a loss. "It is not claimed that the article supplied by Klesner was inferior to that of Sammons, or that the public suffered otherwise financially by Klesner's use of the words 'Shade Shop.'" The mere fact that it is to the interest of the community that private rights be respected is not enough to support a finding of public interest. Public interest is sometimes said to exist when the unfair method employed threatens the existence of present or actual competition, when the circumstances involve flagrant suppression of the weak by the strong, or when the individual loss is small, but the aggregate is so serious and widespread as to make the matter of public consequence.

There is here manifestly no threat to competition. Such effect as the commission's orders may have upon the active competition that now exists will be in the direction of stifling rather than of preserving it. There is no oppression of the weak by the strong, the grinding millers being strong concerns organized into powerful trade organizations, and the record fails wholly to establish any injury to the public or any loss suffered by it, either individually or in the aggregate.

It is not shown that the petitioners' product is injurious to the consumer, or that it is in any way different from or inferior to
191 the product of their competitors. Nor did the commission so find. The commission goes no further than to conclude that when the terms "Mills" or "Milling Company" or "Manufacturer of flour" are used in the flour industry, it is generally understood by dealers and the purchasing public to mean a concern that grinds wheat into flour; that many dealers and consumers prefer to buy flour that comes directly from a concern that grinds the wheat into flour, rather than from one that buys the flour from a grinding concern, because they think that they get from such grinding concern more uniform product, or better product for less money; that many persons have been buying petitioners' flour because from the use of such words or terms in the names under which they do business they believe that they are manufacturers of flour. There is no finding that either dealer or consumer obtained an inferior product, or a product other than he sought to purchase. The case differs, therefore, in the essential prerequisite of public injury from Federal Trade Commission v. Winstead Company (258 U. S. 483) and Federal Trade Commission v. Good-Grape Company, supra. Failing to see any public injury, or financial loss in the methods of competition here reviewed, we find no public interest exists, much less one that is specific and substantial. If there is any deception in the petitioners' representations or trade names, it amounts at most to a private wrong,

as in the Klesner case, and one not to be redressed by action of the commission.

Another finding upon which the commission's conclusions are based remains to be noted. The commission found that the petitioners do not have or maintain a laboratory for testing or analyzing flours which they buy or sell; that they use only the paddle test, by which the characteristics or qualities of flour can not be determined. Assuming this finding to be based upon substantial evidence, we fail to see the appropriateness of the desist order to the evil, if any such exists. (Berkey & Gay Mfg. Company v. Commission, supra.) The orders of the commission in all of the six cases must be set aside and held for naught.

192 In United States Circuit Court of Appeals for the Sixth Circuit

Causes argued and submitted

March 14, 1932

Before MOORMAN, HICKENLOOPER, and SIMONS, JJ.

These causes are argued by T. H. Malone for petitioners and by B. B. Bane for respondent and are submitted to the court.

In United States Circuit Court of Appeals

Decree

Filed May 4, 1932

Nos. 5958, 6098, 6099, 6100, 6101, 6102

Petition to review order of the Federal Trade Commission

This cause came on to be heard on the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order or decree of the said Federal Trade Commission in this cause be, and the same is hereby, set aside and held for naught.

193 [Clerk's certificate to foregoing transcript omitted in printing.]

194 In Supreme Court of the United States

October term, 1932

Order extending time within which to apply for writs of certiorari

Filed July 27, 1932

On consideration of the motion by counsel for petitioner in the above-entitled causes, and good cause therefor having been shown,

It is now here ordered that the time within which petitions for writs of certiorari may be filed herein be, and the same is hereby, extended to and including the 24 day of Sept., 1932.

J. C. McReynolds,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of July, 1932.

195 [Omitted.]

196 [Omitted.]

197 [Omitted.]

[File endorsement omitted.]

198 Supreme Court of the United States

Order allowing certiorari

Filed October 24, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

199 In Supreme Court of the United States

Stipulation and addition to record

Filed Dec. 8, 1932

It is hereby stipulated by and between the parties to the above cause as follows:

1. That attached hereto are certified copies of the material portions of the petitions for review filed in the Circuit Court of Appeals for the Sixth Circuit in causes numbered 5958, 6098, 6099, 6100, 6101, and 6102, respectively, on the docket of said court, the decree in each

of which is under review herein; that the reasons for attaching hereto copies of only the "material portions" of said petitions are set forth in paragraphs 2 and 3 of this stipulation.

2. That the Royal Milling Company's petition for review (No. 5958) contained a lengthy and detailed attack on the findings and order of the Federal Trade Commission, as being unsupported by material evidence, etc.; that, on motion of the commission to strike all the allegations of said petition except those relating to petitioners' residence and the commission's complaint, findings, and order, the Circuit Court of Appeals for the Sixth Circuit entered the following order:

200 "The motion of the respondent to strike out portions of the petition for review having been seen and considered, and it appearing that the first five pages of the petition and the prayer thereof are apparently sufficient as a pleading to raise every question desired, it is ordered:

"(1) That the respondent need not answer and the clerk shall not print in the record the intervening pages of the petition.

"(2) That if hereafter any question arises as to the existence in the petition of any necessary allegation, the petitioner may refer to the original on file."

That the certified copy of the material portions of the Royal Milling Company's petition for review, attached to this stipulation, includes the "first five pages" and the "prayer" of said petition, but does not include Sections III, IV, V, and VI thereof (containing the detailed attack on the commission's findings and order).

3. That the petitions for review in the other five cases referred to in paragraph 1 of this stipulation were thereafter filed in said Circuit Court of Appeals and each of said five petitions in Section IV thereof incorporated by reference all of the allegations of Sections III, IV, V, and VI of the Royal Milling Company's petition; that, by stipulation between the parties filed in said Circuit Court of Appeals, Section IV of each of said five petitions was made subject to the motion to strike and to the ruling of the court thereon in the Royal Milling Company case; that the certified copy of the material portion of each of said five petitions, attached to this stipulation, does not include Section IV thereof.

4. That the Federal Trade Commission did not file any answers to the six petitions for review referred to in paragraph 1 of this stipulation.

5. That all exhibits filed in the Circuit Court of Appeals for the Sixth Circuit shall be filed as original exhibits with the clerk of the United States Supreme Court and shall not be printed

201 as a part of the record in this court, but the parties hereto shall be free to refer to said exhibits, or to quote therefrom in their briefs or oral arguments, in so far as they may be relevant to the issues presented in the petition for certiorari filed herein.

6. That this stipulation and copies of the petitions for review, as attached hereto, shall be printed by the clerk of this court and attached to the present printed transcript of the record in this court.

THOMAS D. THACHER,
Solicitor General.
THOMAS H. MALONE,
Counsel for Respondents.

DECEMBER 5, 1932.

202 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 5958

JOHN MCGRAW AND E. A. GLENNON, CO-PARTNERS DOING BUSINESS under the Firm Name and Style of Royal Milling Company, and individually

vs.

FEDERAL TRADE COMMISSION

To the Honorable the Judges of the United States Circuit Court of Appeals, for the Sixth Circuit:

The petition of John McGraw and E. A. Glennon, co-partners, under the name and style of Royal Milling Company, and individually, respectfully shows to the court:

I

COMMISSION'S ORDER

That you petitioners are residents of Nashville, Tennessee, in the Middle District of Tennessee, and within the Sixth Circuit, and that their place of business, as hereinafter set forth, is situated in said district and circuit.

Your petitioners and their predecessor have been engaged since 1902 in the manufacture and sale of commodities known as self-rising" and "processed" flour, in the city of Nashville, Tennessee, under the name and style of "Royal Milling Company." This business was established in 1902 under said name by R. C. Lindsey, and was purchased by petitioners in 1917. Petitioners, since they acquired the business, have also operated under the trade names "Richland Milling Company" and "Empire Milling Company." Petitioners paid for the trade name and good will of said business the sum of $7,500.00, when it was purchased in 1917.

203 On the 16th day of April, 1931, the Federal Trade Commission made a certain order upon petitioners, directing them:

1. To desist from using the words "Milling Company" in their trade name or names.

2. To cease from making representations—

(a) That they are manufacturers of flour.

(b) That the flour sold by them comes direct from manufacturer to purchaser.

The exact words of the order directed respondents to cease and desist "from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or any other name which includes the words 'Milling Company' or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour sold or offered for sale by them or either of them under such title or name, or by or through any such representations."

A copy of the findings of the Federal Trade Commission and of said order to cease and desist in hereto attached, marked "Exhibit A," to this petition, and made part thereof.

II

OUTLINE

Your petitioners are not "manufacturers of flour" in the
204 sense of grinding wheat berries, and have no desire to make any representations to this effect, and do not believe that they have made such representations.

Nor do petitioners represent, or wish to represent, that their products come direct from a wheat-grinding mill to the customer.

But petitioners respectfully insist that they are manufacturers of "self-rising" and "processed" flour (as hereinafter explained), and that they have the right to so style themselves in their literature.

Petitioners also respectfully insist that they have the right to use the words "Mills" or "Milling" in their trade names, and the action of the Federal Trade Commission (as they are advised) has wrongfully taken away a valuable property right, to wit, the good will which has been built up over a long series of years, during which nobody questioned the right to use such name.

The competition involved in this matter is not between makers of flour in the primary sense, i. e., grinders of wheat berries.

Petitioners do not deal in flour just as it comes from the grinding mill—"raw flour," as it is termed in the record—nor are they in competition with any one dealing exclusively in such flour.

But the predecessor in business of petitioners, and other Nashville producers (some of whom are also ordered to "cease and desist"), many years ago put on the market and made popular a product known as "self-rising" flour, which has to be manufactured in a particular way from flour and other ingredients.

This product was so successful that the wheat-grinding mills, after bitterly opposing it, were forced to install the necessary machinery and take up its manufacture.

205 These grinding mills are, and for many years have been, banded together into a powerful organization known as the Southeastern Millers' Association.

It is this powerful organization which has made the complaint before the Federal Trade Commission, resulting in the present order to "cease and desist," and which is endeavoring to lessen and weaken competition, by instigating the present proceedings against the Nashville producers, a much smaller and weaker body.

The grinding millers, as already shown, were merely the imitators and followers of petitioners, or their predecessors, and other Nashville producers, in this industry. But now, after many years, seeking to pre-empt the field for themselves, they are accusing petitioners and other self-rising flour producers of deceiving the public by calling themselves "mills." And the Federal Trade Commission has been induced to lend them its aid in this effort to lessen or destroy competition.

Petitioners are advised that this is a complete misconstruction of the Federal Trade Commission act, which was designed to promote competition, and to protect the weak from the strong.

Petitioners are further advised that the element of "public interest" is wholly lacking in this case unless it be the public interest involved in protecting the weak from the strong and in making competition as keen as possible.

There is no difference between "self-rising flour" made by a grinding mill and that made by these petitioners. And it is conclusively shown that the consuming public has no interest in who makes the flour, but buys entirely by brands, using that brand which has given satisfaction, whether made by a grinding miller or a manufacturer of self-rising or processed flour.

206 Petitioners have already been put to great expense in resisting the improvident action of the Federal Trade Commission, continued in the face of an offer made by petitioners to state in their literature, etc., that they are not wheat-grinders, as hereinafter set forth, and unless the present order shall be set aside by your honors, they will be unjustly characterized as unfair producers of an inferior product, and their influence as competitors will be greatly lessened, to the prejudice of the consuming public, and for the sole benefit of their powerful commercial rivals. In addition to this, they will lose the good will built up under their trade names.

PRAYER

Premises considered, your petitioners pray:

1. That a copy of this petition be served on the Federal Trade Commission, and that said commission be required to answer the same.

2. That the said commission be required to certify to this court the record in this matter, including the pleadings, the proof in the Watauga Milling Co. case (docket No. 1601), and the stipulations in the other cases, and the various exhibits.

3. That in printing said record only one record be required for the six cases.

4. That upon consideration of said record, the aforesaid order of the Federal Trade Commission be by your honors reviewed, set aside, and for nothing held.

5. That petitioners be given such other, further, and different relief as they in the premises may be entitled to ask.

6. For general relief.

THOMAS H. MALONE,
WM. J. WADE,
Counsel for Petitioners.

207 [Clerk's certificate to foregoing paper omitted in printing.]

208 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 6098

D. V. JOHNSON, DOING BUSINESS UNDER THE NAME OF TENNESSEE Grain Company and Tennessee Milling Company

vs.

FEDERAL TRADE COMMISSION

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of D. V. Johnson, doing business under the name of Tennessee Grain Company and Tennessee Milling Company, respectfully shows to the court:

I

That your petitioner is a resident of Nashville, Tennessee, in the Middle District of Tennessee, and within the Sixth Circuit, and that his place of business, as hereinafter set forth, is situated in said district and circuit.

In 1905 your petitioner, D. V. Johnson, procured a charter from the State of Tennessee under the corporate name "Tennessee Grain Company," and began business as a grain dealer. This charter

was surrendered in 1912, the said D. V. Johnson assuming all liabilities and taking over all assets. Said corporation was organized by your petitioner for the handling of grain, and petitioner continued business as a grain dealer until about the year 1920.

About the year 1920 machinery was installed by petitioner, in his plant, for the grinding of feed and whole-wheat flour. Thereafter, about 1925 or 1926, other machinery was installed for the mak-
209 ing of "self-rising" and "processed" flour, your petitioner at the present time being engaged exclusively in making "self-rising" and "processed" flour, with his plant and place of business in Nashville, Tennessee.

Petitioner is not now engaged in the grinding of whole-wheat flour, or feed, but his plant is equipped for the manufacture of these commodities, though in a limited way as compared to his output of "self-rising" and "processed" flour.

The words "and Tennessee Milling Company" were added to petitioner's trade name because the original corporate and trade name had become confused with similar trade names of other individuals thereafter entering business in this vicinity. This addition was made at a time when petitioner was operating grinding machinery for the manufacture of whole-wheat flour and feed, and before petitioner installed the machinery for making "self-rising" and "processed" flour.

II

That on the 16th day of April, 1931, the Federal Trade Commission made a certain order upon petitioner, directing him:

1. To desist from using the words "Milling Company" in his trade name.

2. To cease from making representations—

(a) That he is a manufacturer of flour.

(b) That the flour sold by him comes direct from manufacturer to purchaser.

The exact words of the order directed petitioner to cease and desist "from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or any other name which includes the words 'Milling Company' or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any
210 manner whatsoever, designed to promote or otherwise affect interstate commerce, that he is a manufacturer of flour, or that the flour sold by him comes direct from manufacturer to purchaser, unless and until respondent actually owns and operates or directly and absolutely controls a factory or a mill wherein is made by grinding or crushing the wheat berry any and all flour by him sold or offered for sale under such title or name, or by or through any advertisement or other representation that he is a manufacturer of flour."

A copy of the findings of the Federal Trade Commission and of said order to cease and desist is hereto attached, marked "Exhibit A," to this petition, and made part thereof.

III

That your petitioner is not at the present time a "manufacturer of flour" in the sense of grinding wheat berries, and has no desire to make any representation to this effect, and does not believe that he has made such representation.

Nor does your petitioner represent, or wish to represent, that his products come direct from a grinding mill to the customer.

But petitioner respectfully insists that he is a manufacturer of "self-rising" and "processed" flour (as hereinafter explained), and that he has the right to so style himself in his literature.

Petitioner also respectfully insists that he has the right to use the words "Mills" or "Milling" in his trade name, and the action of the Federal Trade Commission (as he is advised) has wrongfully taken away a valuable property right, to wit, the good will which has been built up over a long series of years, during which nobody questioned the right to use such name. This is especially true since petitioner had and has machinery for grinding wheat and feed in his plant, as hereinbefore set out.

211 The competition involved in this matter is not between makers of flour in the primary sense, i. e., grinders of wheat berries.

Petitioner does not deal in flour just as it comes from the grinding mill—"raw flour," as it is termed in the record—nor is he in competition with any one dealing exclusively in such flour. But other Nashville producers (some of whom are also ordered to "cease and desist") many years ago put on the market and made popular a product known as "self-rising" flour, which has to be manufactured in a particular way from flour and other ingredients.

This product was so successful that the wheat-grinding mills, after bitterly opposing it, were forced to install the necessary machinery and take up its manufacture.

These grinding mills are, and for many years have been, banded together into a powerful organization known as the Southeastern Millers' Association.

It is this powerful organization which has made the complaint before the Federal Trade Commission, resulting in the present order to "cease and desist," and which is endeavoring to lessen and weaken competition, by instigating the present proceedings against the Nashville producers, a much smaller and weaker body.

The grinding millers, as already shown, were merely the imitators and followers of petitioner and other Nashville producers, in this industry. But now, after many years, seeking to pre-empt the field for themselves, they are accusing petitioner and other self-rising

flour producers of deceiving the public by calling themselves "mills." And the Federal Trade Commission has been induced to lend them its aid in this effort to lessen or destroy competition.

Petitioner is advised that this is a complete misconstruction of the Federal Trade Commission act, which was designed to
212 promote competition, and to protect the weak from the strong.

Petitioner is further advised that the element of "public interest" is wholly lacking in this case, unless it be the public interest involved in protecting the weak from the strong and in making competition as keen as possible.

There is no difference between the "self-rising flour" made by a grinding mill and that made by petitioner. And it is conclusively shown that the consuming public has no interest in who makes the flour, but buys entirely by brands, using the brand which has given satisfaction, whether made by a grinding miller or a manufacturer of self-rising or processed flour.

Petitioner has already been put to great expense in resisting the improvident action of the Federal Trade Commission, continued in the face of an offer made by petitioner to state in his literature, etc., that he is not a wheat grinder, as hereinafter set forth, and unless the present order shall be set aside by your honors, he will be unjustly criticized as an unfair producer of an inferior product, and his influence as a competitor will be greatly lessened, to the prejudice of the consuming public, and for the sole benefit of his powerful commercial rivals. In addition to this, he will lose the good will built up under his trade name.

Premises considered, your petitioner prays:

1. That a copy of this petition be served on the Federal Trade Commission, and that said commission be required to answer the same.

2. That said commission be required to certify to this court the record in this matter, including the pleadings, the proof in the Watauga Milling Company case (docket No. 1601), and the stipulations in the other cases, and the various exhibits.

3. That in printing said record only one record for the
213 six cases be required.

4. That upon consideration of said record the aforesaid order of the Federal Trade Commission be by your honors reviewed, set aside, and for nothing held.

5. That petitioner be given such other, further, and different relief as he in the premises may be entitled to ask.

6. For general relief.

THOMAS H. MALONE,
WM. J. WADE,
Counsel for Petitioner.

[Clerk's certificate to foregoing paper omitted in printing.]

215 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 6099

NASHVILLE ROLLER MILLS, A CORPORATION, JOHN SCHULTZ, AS PRESIDENT, LOUIS BAUJAN, AS VICE PRESIDENT, VERNON S. TUPPER, AS SECRETARY AND TREASURER, AND EACH INDIVIDUALLY

vs.

FEDERAL TRADE COMMISSION

To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Sixth Circuit:

The petition of Nashville Roller Mills, a corporation, John Schultz, as president, Louis Baujan, as vice president, Vernon S. Tupper, as secretary and treasurer, and each individually, respectfully shows to the court:

I

That your petitioner, Nashville Roller Mills, is a corporation duly chartered and existing under the laws of Tennessee, having its principal office and place of business in Nashville, Tennessee, in the Middle District of Tennessee, and within the Sixth Circuit, and that its plant and place of business as hereinafter set forth, is situated in said district and circuit. The petitioner John Schultz is president, the petitioner Louis Baujan is vice president, and the petitioner Vernon S. Tupper is secretary of said corporation.

Said petitioner Nashville Roller Mills was chartered under the laws of Tennessee in the year 1908, and from 1908 until July, 1913, said corporation operated a wheat-grinding plant, which was burned in July, 1913, and then rebuilt as a plant for the making of
216 "self-rising" and "processed" flour, and has since been operated as such.

II

That on the 16th day of April, 1931, the Federal Trade Commission made a certain order upon petitioners, directing them and each of them:

1. To desist from using the words "Mills" or "Milling Company."
2. To cease from making representations—

(a) That they are manufacturers of flour.

(b) That the flour sold by them comes direct from manufacturer to purchaser.

The exact words of the order directed petitioners and each of them to cease and desist "from carrying on the business of selling

flour in commerce among the several States of the United States under a trade name, corporate name or any other name which includes the word "Mills" or the words "Milling Company" or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such word or words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such title or name, or by or through any such representations."

A copy of the findings of the Federal Trade Commission and of said order to cease and desist, is hereto attached, marked "Exhibit A," to this petition, and made part thereof.

217 III

That your petitioner Nashville Roller Mills is not at the present time a "manufacturer of flour" in the sense of grinding wheat berries, and has no desire to make any representations to this effect, nor have the other petitioners, and petitioners do not believe that they, or either of them, have made such representations.

Nor do your petitioners represent, or wish to represent, that the products of petitioner Nashville Roller Mills come direct from a grinding mill to the customer.

But petitioners respectfully insist that petitioner Nashville Roller Mills is a manufacturer of "self-rising" and "processed" flour (as hereinafter explained), and that they have the right to so style petitioner Nashville Roller Mills in its literature.

Petitioners also respectfully insist that the petitioner Nashville Roller Mills has the right to use the word "Roller mills," or the words "Mills" or "Milling," in its corporate name, and the action of the Federal Trade Commission (as they are advised) has wrongfully taken away a valuable property right, to wit, the good will which has been built up over a long series of years, during which nobody questioned the right to use such name. This is especially true, in view of the facts as to the origin of said name, hereinbefore set out.

The competition involved in this matter is not between makers of flour in the primary sense, i. e., grinders of wheat berries. Petitioner Nashville Roller Mills does not deal in flour just as it comes from the grinding mill—"raw flour," as it is termed in the record—nor is it in competition with any one dealing exclusively in such flour. But said petitioner and other Nashville producers (some of

whom are also ordered to "cease and desist") many years ago put on the market and made popular a product known as "self-rising" flour, which has to be manufactured in a particular way from flour and other ingredients.

218 This product was so successful that the wheat-grinding mills, after bitterly opposing it, were forced to install the necessary machinery and take up its manufacture.

These grinding mills are, and for many years have been, banded together into a powerful organization, known as the Southeastern Millers' Association.

It is this powerful organization which has made the complaint before the Federal Trade Commission, resulting in the present order to "cease and desist," and which is endeavoring to lessen and weaken competition by instigating the present proceedings against the Nashville producers, a much smaller and weaker body.

The grinding millers, as already shown, were merely the imitators and followers of petitioner Nashville Roller Mills and other Nashville producers in this industry. But now, after many years, seeking to pre-empt the field for themselves, they are accusing petitioner Nashville Roller Mills and other self-rising flour producers of deceiving the public by calling themselves "Mills," and the Federal Trade Commission has been induced to lend them its aid in this effort to lessen or destroy competition.

Petitioners are advised that this is a complete misconstruction of the Federal Trade Commission act, which was designed to promote competition and to protect the weak from the strong.

Petitioners are further advised that the element of "public interest" is wholly lacking in this case unless it be the public interest involved in protecting the weak from the strong, and in making competition as keen as possible.

There is no difference between the "self-rising flour" made by a grinding mill and that made by petitioner Nashville Roller Mills.

219 And it is conclusively shown that the consuming public has no interest in who makes the flour, but buys entirely by brands, using the brand which has given satisfaction whether made by a grinding miller or a manufacturer of "self-rising" or "processed" flour.

Petitioners have already been put to great expense in resisting the improvident action of the Federal Trade Commission, continued in the face of an offer made by petitioners to state in the literature, etc., of the Nashville Roller Mills that it is not a wheat grinder, as hereinafter set forth, and unless the present order shall be set aside by your honors, petitioners will be unjustly criticized as unfair producers of an inferior product, and their influence as competitors will be greatly lessened, to the prejudice of the consuming public, and for the sole benefit of powerful commercial rivals. In addition to this, petitioner Nashville Roller Mills will lose the good will built up under its corporate name.

Premises considered, your petitioners pray:

1. That a copy of this petition be served on the Federal Trade Commission, and that said commission be required to answer the same.

2. That said commission be required to certify to this court the record in this matter, including the pleadings, the proof in the Watauga Milling Company case (docket No. 1601), and the stipulations in the other cases, and the various exhibits.

3. That in printing said record only one record for the six cases be required.

220 4. That upon consideration of said record the aforesaid order of the Federal Trade Commission be by your honors reviewed, set aside, and for nothing held.

5. That petitioners be given such other, further, and different relief as they in the premises may be entitled to ask.

6. For general relief.

THOMAS H. MALONE,
WM. J. WADE,
Counsel for Petitioners.

221 [Clerk's certificate to foregoing paper omitted in printing.]

222 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 6100

SNELL MILLING COMPANY, A CORPORATION, THOMAS E. SNELL, AS President, and J. A. Stevens, as Vice President, and Each Individually

vs.

FEDERAL TRADE COMMISSION

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of Snell Milling Company, a corporation, Thomas E. Snell, as president, and J. A. Stevens, as vice president, and each individually, respectfully shows to the court:

I

That your petitioner Snell Milling Company is a corporation duly chartered and existing under the laws of Tennessee, with its principal office and place of business in Nashville, Tennessee, in the Middle District of Tennessee, and within the Sixth Circuit.

The petitioners, Thomas E. Snell and J. A. Stevens, are respectively president and vice president of said corporation, and reside within the Middle District of Tennessee.

Petitioner Snell Milling Company was chartered and organized in 1925 as a corporation under the laws of Tennessee, and has since that time conducted in Nashville, Tennessee, the business of manufacturing "self-rising" and "processed" flour, as hereinafter explained. Said corporation also operates under the trade
223 names "Peabody Mill Company" and "Mero Mills," having acquired the bags, stock of flour, good will, brands, and trade name of said "Mero Mills" in July 1928.

II

That on the 16th day of April, 1931, the Federal Trade Commission made a certain order upon petitioners, directing them and each of them:

1. To desist from using the words "Mills" or "Milling Company" in their corporate or trade names.

2. To cease from making representations—

(a) That they are manufacturers of flour.

(b) That the flour sold by them comes direct from manufacturer to purchaser.

The exact words of the order directed petitioners to cease and desist "from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or corporate name or any other name which includes the word 'Mills' or the words 'Milling Company' or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the respondent using such words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such title or name, or by or through any such representations."

224 A copy of the findings of the Federal Trade Commission and of said order to cease and desist is hereto attached, marked "Exhibit A," to this petition, and made part thereof.

III

That your petitioner Snell Milling Company is not a "manufacturer of flour" in the sense of grinding wheat berries, and petitioners have no desire to make any representations to this effect, and do not believe that they have made such representations.

Nor do your petitioners represent, or wish to represent, that the products of petitioner Snell Milling Company come direct from a grinding mill to the customer.

But petitioners respectfully insist that petitioner Snell Milling Company is a manufacturer of "self-rising" and "processed" flour (as hereinafter explained), and that petitioners have the right to so state in their literature.

Petitioners also respectfully insist that they have the right to use the words "Mills" or "Milling" in corporate or trade names, and the action of the Federal Trade Commission (as they are advised) has wrongfully taken away a valuable property right, to wit, the good will which has been built up over a series of years, during which nobody questioned the right to use such name.

The competition involved in this matter is not between makers of flour in the primary sense, i. e., grinders of wheat berries.

Petitioners do not deal in flour just as it comes from the grinding mill— "raw flour," as it is termed in the record—nor are they in competition with any one dealing exclusively in such flour. But the predecessor of petitioners and other Nashville producers (some
225 of whom are also ordered to "cease and desist") many years ago put on the market and made popular a product known as "self-rising" flour, which has to be manufactured in a particular way from flour and other ingredients.

This product was so successful that the wheat-grinding mills, after bitterly opposing it, were forced to install the necessary machinery and take up its manufacture.

These grinding mills are, and for many years have been, banded together into a powerful organization known as the Southeastern Millers' Association.

It is this powerful organization which has made the complaint before the Federal Trade Commission, resulting in the present order to "cease and desist," and which is endeavoring to lessen and weaken competition, by instigating the present proceedings against the Nashville producers, a much smaller and weaker body.

The grinding millers, as already shown, were merely the imitators and followers of petitioner's predecessor and other Nashville producers, in this industry. But now, after many years, seeking to pre-empt the field for themselves, they are accusing petitioners and other self-rising flour producers of deceiving the public by calling themselves "mills." And the Federal Trade Commission has been induced to lend them its aid in this effort to lessen or destroy competition.

Petitioners are advised that this is a complete misconstruction of the Federal Trade Commission act, which was designed to promote competition, and to protect the weak from the strong.

Petitioners are further advised that the element of "public interest" is wholly lacking in this case, unless it be the public interest involved in protecting the weak from the strong and in making competition as keen as possible.

226 There is no difference between the "self-rising flour" made by a grinding mill and that made by petitioner Snell Milling

Company. And it is conclusively shown that the consuming public has no interest in who makes the flour, but buys entirely by brands, using the brand which has given satisfaction, whether made by a grinding miller or a manufacturer of self-rising or processed flour.

Petitioners have already been put to great expense in resisting the improvident action of the Federal Trade Commission, continued in the face of an offer made by petitioners to state in their literature, etc., that they are not wheat grinders, as hereinafter set forth, and unless the present order shall be set aside by your honors, they will be unjustly criticized as unfair producers of an inferior product, and their influence as competitors will be greatly lessened, to the prejudice of the consuming public, and for the sole benefit of their powerful commercial rivals. In addition to this, they will lose the good will built up under their corporate and trade name.

Premises considered, your petitioners pray:

1. That a copy of this petition be served on the Federal Trade Commission, and that said commission be required to answer the same.

2. That said commission be required to certify to this court the record in this matter, including the pleadings, the proof in the Watauga Milling Company case (docket No. 1601), and the stipulations in the other case, and the various exhibits.

3. That in printing said record only one record for the six cases be required.

227 4. That upon consideration of said record the aforesaid order of the Federal Trade Commission be by your honors reviewed, set aside, and for nothing held.

5. That petitioners be given such other, further, and different relief as they in the premises may be entitled to ask.

6. For general relief.

(s) THOMAS H. MALONE,
(s) WM. J. WADE,
Counsel for Petitioners.

228 [Clerk's certificate to foregoing paper omitted in printing.]

229 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 6101

J. A. WELLS, J. M. WILKERSON, H. P. JOHNSON, AND MRS. H. P. Johnson, Co-partners Doing Business Under the Names State Milling Company and Myracle Milling Company, and Individually

vs.

FEDERAL TRADE COMMISSION

To the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of J. A. Wells, J. M. Wilkerson, H. P. Johnson, and Mrs. H. P. Johnson, co-partners doing business under the names State Milling Company and Myracle Milling Company, and individually, respectfully shows to the court:

I

That your petitioners are residents of Nashville, Tennessee, in the Middle District of Tennessee, and within the Sixth Circuit, and that their place of business, as hereinafter set forth, is situated in said district and circuit.

Petitioners are engaged in the manufacture of commodities known as "self-rising" and "processed" flour, carrying on said business as a partnership under the name of "State Milling Company" and also "Myracle Milling Company." Said business was begun in the city of Nashville, Tennessee, by your petitioners on January 1, 1924, at which time they purchased the good will and equipment of the State Milling Company for the sum of $32,500.00. Said State Milling Company (their predecessor) had carried on this business under that name in the same location since about 1912.

230 II

That on the 16th day of April, 1931, the Federal Trade Commission made a certain order upon petitioners, directing them:

1. To desist from using the words "Milling Company" in their trade names.

2. To cease from making representations—

(a) That they are manufacturers of flour.

(b) That the flour sold by them comes direct from manufacturer to purchaser.

The exact words of the order directed petitioners to cease and desist "from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or

any other name which includes the words 'Milling Company' or words of like import, and from making representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such title or name, or by or through any such representations."

A copy of the findings of the Federal Trade Commission and of said order to cease and desist is hereto attached, marked
231 "Exhibit A," to this petition, and made part thereof.

III

That your petitioners are not "manufacturers of flour" in the sense of grinding wheat berries, and have no desire to make any representation to this effect, and do not believe that they have made such representation.

Nor do your petitioners represent, or wish to represent, that their products come direct from a grinding mill to the customer.

But petitioners respectfully insist that they are manufacturers of "self-rising" and "processed" flour (as hereinafter explained), and that they have the right to so style themselves in their literature.

Petitioners also respectfully insist that they have the right to use the words "Mills" or "Milling" in their trade names, and the action of the Federal Trade Commission (as they are advised) has wrongfully taken away a valuable property right, to wit, the good will under the name "State Milling Company" which has been built up over a long series of years, during which nobody questioned the right to use such name. This is especially true, in view of the large price paid by petitioners, as hereinbefore set out.

The competition involved in this matter is not between makers of flour in the primary sense, i. e., grinders of wheat berries.

Petitioners do not deal in flour just as it comes from the grinding mill—"raw flour," as it is termed in the record—nor are they in competition with any one dealing exclusively in such flour. But the predecessor and business of these petitioners and other Nashville producers (some of whom are also ordered to "cease and desist") many years ago put on the market and made popular a product known as "self-rising flour," which has to be manufactured in a particular way from flour and other ingredients.

232 This product was so successful that the wheat-grinding mills, after bitterly opposing it, were forced to install the necessary machinery and take up its manufacture.

These grinding mills are, and for many years have been, banded together into a powerful organization known as the Southeastern Millers' Association.

It is this powerful organization which has made the complaint before the Federal Trade Commission, resulting in the present order to "cease and desist," and which is endeavoring to lessen and weaken competition, by instigating the present proceedings against the Nashville producers, a much smaller and weaker body.

The grinding millers, as already shown, were merely the imitators and followers of petitioners, or their predecessor, and other Nashville producers, in this industry. But now, after many years, seeking to prevent the field for themselves, they are accusing petitioners and other self-rising flour producers of deceiving the public by calling themselves "mills." And the Federal Trade Commission has been induced to lend them its aid in this effort to lessen or destroy competition.

Petitioners are advised that this is a complete misconstruction of the Federal Trade Commission act, which was designed to promote competition, and to protect the weak from the strong.

Petitioners are further advised that the element of "public interest" is wholly lacking in this case, unless it be the public interest involved in protecting the weak from the strong and in making competition as keen as possible.

There is no difference between the "self-rising flour" made by a grinding mill and that made by petitioners. And it is conclusively shown that the consuming public has no interest in who makes the flour, but buys entirely by brands, using the brand which has
233 given satisfaction, whether made by a grinding miller or a manufacturer of self-rising or processed flour.

Petitioners have already been put to great expense in resisting the improvident action of the Federal Trade Commission, continued in the face of an offer made by petitioners to state in their literature, etc., that they are not wheat grinders, as hereinafer set forth, and unless the present order shall be set aside by your honors, they will be unjustly criticized as unfair producers of an inferior product, and their influence as competitors will be greatly lessened, to the prejudice of the consuming public, and for the sole benefit of their powerful commercial rivals. In addition to this, they will lose the good will built up under their trade names.

Premises considered, your petitioners pray:

1. That a copy of this petition be served on the Federal Trade Commission, and that said commission be required to answer the same.

2. That said commission be required to certify to this court the record in this matter, including the pleadings, the proof in the Watauga Milling Company case (docket No. 1601), and the stipulations in the other cases, and the various exhibits.

3. That in printing said record only one record for the six cases be required.

4. That upon consideration of said record the aforesaid order of the Federal Trade Commission be by your honors reviewed, set aside, and for nothing held.

5. That petitioners be given such other, further, and different relief as they in the premises may be entitled to ask.

6. For general relief.

THOMAS H. MALONE,
WM. J. WADE,
Counsel for Petitioners.

234 [Clerk's certificate to foregoing paper omitted in printing.]

235 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 6102

E. C. FAIRCLOTH, SR., E. C. FAIRCLOTH, JR., F. B. EVERS, AND ESTATE of C. K. Evers, Co-partners Doing Business under the Name Cherokee Mills, and Individually

vs.

FEDERAL TRADE COMMISSION

To the Honorable The Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The petition of E. C. Faircloth, sr., E. C. Faircloth, jr., F. B. Evers, and estate of C. K. Evers, co-partners doing business under the name Cherokee Mills, and individually, respectfully shows to the court:

I

That your petitioners are residents of Nashville, Tennessee, in the middle district of Tennessee, and within the sixth circuit, and that their place of business, as hereinafter set forth, is situated in said district and circuit.

Your petitioners have since 1910 been engaged in the manufacture and sale of commodities known as "self-rising" and "processed" flour in the city of Nashville, Tennessee, under the name and style of "Cherokee Mills." Said business was begun under the name "Cherokee Mills" in Nashville, Tennessee, in the year 1910, as aforesaid, by E. C. Faircloth, sr., and C. K. Evers, both of whom are now dead, the said E. C. Faircloth, sr., having departed
236 this life after the filing of the complaint herein by the Federal Trade Commission, and on the 13th day of March, 1929.

The present members of said partnership are estate of E. C. Faircloth, sr., estate of C. K. Evers, E. C. Faircloth, jr., F. W. Faircloth, and F. B. Evers.

Said partnership conducts its business in a plant in Nashville, Tennessee, and also a branch in Birmingham, Alabama, established in the year 1922. Both of said plants operate under the name "Cherokee Mills."

Petitioners are engaged in making "self-rising" and "processed" flour, and are also engaged in making mixed feed for cattle or other animals, and not for human consumption. Said "mixed feed" is produced by the grinding of wheat, corn, together with other elements, such as hay, alfalfa, etc. The making of this "mixed feed" is carried on by separate and different machinery from that used in the production of "self-rising" and "processed" flour, the feed-manufacturing unit and the grinding machinery therefor being a separate part of the general plant.

II

That on the 16th day of April, 1931, the Federal Trade Commission made an order upon petitioners, and each of them, directing them:

1. To desist from using the word "Mills" in their trade name.
2. To cease from making representations—

(a) That they are manufacturers of flour.

(b) That the flour sold by them comes direct from manufacturer to purchaser.

The exact words of this order directed petitioners, and each of them, to cease and desist "from carrying on the business of selling flour in commerce among the several States of the United States under a trade name or any other name which includes the word 'Mills' or word or words of like import, and from making
237 representations through advertisements, circulars, correspondence stationery, or in any manner whatsoever, designed to promote or otherwise affect interstate commerce, that they or either of them is a manufacturer of flour, or that the flour sold by them or either of them comes direct from manufacturer to purchaser, unless and until respondents, or the individual respondent using such word or words or making such representations, actually owns and operates or directly and absolutely controls a factory or mill wherein is made by grinding or crushing the wheat berry any and all flour by them or any of them sold or offered for sale under such name or title, or by or through any such representations."

A copy of the findings of the Federal Trade Commission, and of said order to cease and desist, is hereto attached, marked "Exhibit A" to this petition, and made part thereof.

III

That your petitioners are not "manufacturers of flour" in the sense of grinding wheat berries, and have no desire to make any representation to this effect, and do not believe that they have made such representation; nor do your petitioners represent, or wish to represent, that the "self-rising" and "processed" flour made by them come direct from a grinding mill to the customer.

But petitioners respectfully insist that they are manufacturers of "self-rising" and "processed" flour (as hereinafter explained), and that they have the right to so style themselves in their literature.

Petitioners also respectfully insist that they have the right to use the word "Mills" in their trade name, and the action of the Federal Trade Commission (as they are advised) has wrongfully taken away a valuable property right, to wit, the good will which has been built up over a long series of years, during which nobody questioned
238 the right to use such name. This is especially true, since petitioners are engaged in grinding wheat and other materials in their plant (although not for human consumption), as hereinbefore set out.

The competition involved in this matter is not between makers of flour in the primary sense, i. e., grinders of wheat berries.

Petitioners do not deal in flour just as it comes from the grinding mill—"raw flour," as is is termed in the record—nor are they in competition with any one dealing exclusively in such flour. But petitioners and other Nashville producers (some of whom are also ordered to "cease and desist") many years ago put on the market, and made popular, a product known as "self-rising" flour, which has to be manufactured in a particular way from flour and other ingredients.

This product was so successful that the wheat-grinding mills, after bitterly opposing it, were forced to install the necessary machinery and take up its manufacture.

These grinding mills are, and for many years have been, banded together into a powerful organization known as the Southeastern Millers' Association.

It is this powerful organization which has made the complaint before the Federal Trade Commission, resulting in the present order to "cease and desist," and which is endeavoring to lessen and weaken competition by instigating the present proceedings against the Nashville producers, a much smaller and weaker body.

The grinding millers, as already shown, were merely the imitators and followers of petitioners and other Nashville producers in this industry. But now, after many years, seeking to pre-empt the field for themselves, they are accusing petitioners and other self-rising flour producers of deceiving the public, by calling themselves
239 "Mills." And the Federal Trade Commission has been induced to lend them its aid in this effort to lessen or destroy competition.

Petitioners are advised that this is a complete misconstruction of the Federal Trade Commission act, which was designed to promote competition and to protect the weak from the strong.

Petitioners are further advised that the element of "public interest" is wholly lacking in this case, unless it be the public interest involved in protecting the weak from the strong, and in making competition as keen as possible.

There is no difference between the "self-rising" flour made by a grinding mill and that made by petitioners, and it is conclusively shown that the consuming public has no interest in who makes the flour, but buys entirely by brands, using the brand which has given satisfaction, whether made by a grinding miller or a manufacturer of "self-rising" or "processed" flour.

Petitioners have already been put to great expense in resisting the improvident action of the Federal Trade Commission, continued in the face of an offer made by petitioners to use words in their literature, etc., which would relieve any misapprehension on the subject, as shown in the stipulation of counsel made before the Federal Trade Commission, and unless the present order shall be set aside by your honors, they will be unjustly criticized as unfair producers of an inferior product, and their influence as competitors will be greatly lessened, to the prejudice of the consuming public and for the sole benefit of their powerful commercial rivals. In addition to this, petitioners will lose the good will built up under their trade name.

Premises considered, petitioners prays:

1. That a copy of this petition be served on the Federal Trade Commission, and that said commission be required to answer the same.

240 2. That said commission be required to certify to this court the record in this matter, including the pleadings, the proof in the Watauga Milling Company case (docket No. 1601), and the stipulations in the other cases, and the various exhibits.

3. That in printing said record only one record for the six cases be required.

4. That upon consideration of said record, the aforesaid order of the Federal Trade Commission be by your honors reviewed, set aside, and for nothing held.

5. That petitioners be given such other, further and different relief as they in the premises may be entitled to ask.

6. For general relief.

THOMAS H. MALONE,
WM. J. WADE,
Counsel for Petitioners.

241 [Clerk's certificate to foregoing paper omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1932